Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

LINDA L. HOLLINS,

Petitioner,

v.

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a social security claim, an appealable sentence four remand from a district court precludes evaluation of issues that were not addressed in the remand order of the magistrate judge or district court and were not the subject of any appeal.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Linda L. Hollins, an individual residing in the Southern District of Ohio. Petitioner has no corporate affiliations. Linda L. Hollins was the claimant in an application for social security disability benefits as a disabled widow processed by respondent, Commissioner of Social Security. Petitioner was also the Plaintiff in the proceedings in the U.S. District Court and Appellant in the Sixth Circuit Court of Appeals.

Respondent

Respondent is JoAnne B. Barnhart, Commissioner of Social Security, the agency which denied petitioner's application for benefits. Respondent was the defendant in the proceedings before the U.S. District Court and was the Appellee in the Sixth Circuit Court of Appeals.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities vi

Opinions Below 1

Jurisdiction 2

Statutory and Regulatory Provisions Involved 2

Statement of the Case 6

Reasons for Granting the Petition 8

Conclusion 18

Appendix

Appendix A
Order, U.S. Court of Appeals for the Sixth Circuit Denying Appellant's Petition For Rehearing *en banc,* filed January 10, 2003 . . . . 1a

Appendix B
Opinion, U.S. Court of Appeals for the Sixth Circuit filed October 17, 2002 . . . . . 3a

Appendix C
Judgment and Opinion and Order U.S. District Court for the Southern District of Ohio, Eastern Division entered on March 12, 2001 . . 16a

Appendix D
Action of Appeals Council Refusing to Accept Jurisdiction dated February 12, 2000 . . . . . 31a

Appendix E
Decision of James I.K. Knapp, Administrative Law Judge dated November 10, 1999 . . . . . 36a

Appendix F
Order of Appeals Council remanding Case to Administrative Law Judge, Pursuant to District Court Order, dated March 12, 1999 . . . . . 73a

Appendix G
Order and Judgment in a Civil Case, U.S. District Court for the Southern District of Ohio, Eastern Division entered on January 22, 1998 . . . . . 75a

Appendix H
Report and Recommendation, U. S. Magistrate Judge for the Southern District of Ohio, Eastern Division entered November 26, 1997 . 79a

Appendix I
Action of Appeals Council on Request For Review dated March 12, 1997 . . . . . 88a

Appendix J
Decision of James I.K. Knapp, Administrative
Law Judge dated May 3, 1996 . . . . . 91a

TABLE OF CITED AUTHORITIES

Cases:

Chrupcala v. Heckler,
829 F.2d 1269 (3d Cir. 1987) 10, 13, 16, 17

Clarke v. Bowen, 843 F.2d 271 (8th Cir. 1988) . . . 15, 17

Doe v. New York City Dept. of Soc. Svcs.,
709 F.2d 782 (2d Cir. 1983),
cert den. sub nom Catholic Home Bureau v. Doe,
464 U.S. 864 (1983) 17

Federated Dept. Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 11, 13

Fogel v. Chestnutt, 668 F.2d 100 (2d Cir. 1981),
cert den. 459 U.S. 828 (1982) 16

Forney v. Apfel, 524 U.S. 266 (1998) 9

Hanover Ins. Co. v. American Engineering Co.,
105 F.3d 306 (6th Cir. 1997) 9

Hillhouse v. Harris, 547 F.Supp. 88 (W.D. Ark. 1982),
aff'd, 715 F.2d 428 (8th Cir.1983) 15

Holst v. Bowen, 637 F.Supp. 145 (E.D. WA 1986) . . . 17

Hooper v. Heckler, 752 F.2d 83 (4th Cir. 1985) 16

Horrell v. Chater, 54 F.3d 787 (10th Cir. 1995) 16

Key v. Sullivan, 925 F.2d 1065 (7th Cir. 1991) 16

Little Earth of the United Tribes, Inc. v. HUD,
807 F.2d 1433 (8th Cir. 1986) 15

Mefford v. Gardner, 383 F.2d 748 (6th Cir. 1967) . 10, 17

Melkonyan v. Sullivan, 501 U.S. 89 (1991) 9

Ozbun v. Callahan,
968 F.Supp 478 (S.D. Iowa 1997) 16

Petition of U.S. Steel Corp.,
470 F.2d 489 (6th Cir. 1973),
cert. den. 414 U.S. 859 (1973) 9

Plummer v. Apfel, 186 F.3d 422 (3d Cir. 1999) 16

Rivet v. Louisiana, 522 U.S. 470 (1998) 11, 13

Ruiz v. Apfel, 24 F.Supp. 2d 1045 (C.D. CA 1998) 10, 11

Shalala v. Schaefer, 509 U.S. 292 (1993) 9, 14

Soth v. Chater, 937 F.Supp. 840 (S.D. Iowa 1996) 16

Steahr v. Apfel, 151 F.3d 1124 (8th Cir. 1998) 16

Sullivan v. Finkelstein, 496 U.S. 617 (1990) 9, 12

Sullivan v. Hudson, 490 U.S. 877 (1984) 8, 10, 13

Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984),
aff'd 474 U.S. 140 (1985) 12

Wilder v. Apfel 153 F.3d 799 (7th Cir. 1998) 17

Youghiogheny and Ohio Coal Co. v. Milliken,
200 F.3d 942 (6th Cir. 1999) 9, 10

Statutes:

42 U.S.C. § 405(g) . . . . . *passim*
28 U.S.C. § 2111 . . . . . 4, 17

Regulations:

20 C.F.R. § 404.983 . . . . . *passim*
20 C.F.R. § 404.977 . . . . . 4, 5, 10
20 C.F.R. §§ 404.1512-404.1518 . . . . . 7, 11

Petitioner Linda Hollins (hereinafter "Hollins") respectfully petitions this Court to issue a *writ of certiorari* to review the October 17, 2002 opinion of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit"), affirming the final decision of the Commissioner of Social Security denying her application for disabled widow's benefits (Appendix., infra, at 3a-15a)(hereinafter "Apx. at"). Hollins filed a timely petition for rehearing *en banc*, which the Sixth Circuit denied on January 10, 2003 (Apx. at 1a-2a).

OPINIONS BELOW

The October 17, 2002 opinion of the Sixth Circuit (Apx. at 3a-15a) is unreported. The January 10, 2003 order of the Sixth Circuit (Apx. at 1a-2a) denying the petition for rehearing *en banc* is also unreported. The March 12, 2001 Opinion and Order of the U.S. District Court (*Hollins II*) is unreported (Apx. at 16a-30a). The November 26, 1997 Report and Recommendation of the Magistrate Judge (Apx. at 79a-87a) and the January 14, 1998 Order and Judgment of Remand (Apx. at 75a-78a) (*Hollins I*) are unreported.

Also unreported are the decision by the Administrative Law Judge (hereinafter "ALJ") from his May 3, 1996 denial of benefits (Apx. at 91a-118a), the March 12, 1997 decision of the Appeals Council in *Hollins I* (Apx. at 88a-90a), and the order of remand by the Appeals Council dated March 12, 1999, issued after the remand order by the District Court in *Hollins I* (Apx. at 73a-74a).

The November 10, 1999 decision of the ALJ after the remand is also unreported (Apx. at 36a-72a), as is the February 12, 2000 decision of the Appeals Council (Apx. at 31a-35a).

JURISDICTION

The Sixth Circuit filed its original opinion on October 17, 2002, and denied petitioner's timely petition for rehearing *en banc* on January 10, 2003. This petition for a *writ of certiorari* was filed within 90 days of the denial of the petition for rehearing, making it timely under Supreme Court Rules 13.3, 29.2 and 30.1. The jurisdiction of this court is invoked pursuant to 28 U.S.C.§ 1254(l).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This matter involves the following statutes:

42 U.S.C. § 405(g) Judicial review.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of

the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in

accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

28 U.S.C. § 2111 Harmless Error.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

This matter involves regulations 20 C.F.R. § 404.983 and 20 C.F.R. § 404.977:

20 C.F.R. § 404.983

§ 404.983 Case remanded by a Federal court.

When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision, or it may remand the case to an administrative law judge with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. If the case is remanded by the Appeals Council, the procedures explained in § 404.977 will be followed. Any issues relating to your claim may be considered by the administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in your case.

20 C.F.R. § 404.977

§ 404.977 Case remanded by Appeals Council.

(a) When the Appeals Council may remand a case. The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required.

(b) Action by administrative law judge on remand. The administrative law judge shall take any action that is ordered by the Appeals Council and may take any additional action that is not inconsistent with the Appeals Council's remand order.

(c) Notice when case is returned with a recommended decision. When the administrative law judge sends a case to the Appeals Council with a recommended decision, a notice is mailed to the parties at their last known address. The notice tells them that the case has been sent to the Appeals Council, explains the rules for filing briefs or other written statements with the Appeals Council, and includes a copy of the recommended decision.

(d) Filing briefs with and obtaining evidence from the Appeals Council.

(1) You may file briefs or other written statements about the facts and law relevant to your case with the Appeals Council within 20 days of the date that the recommended decision is mailed to you. Any party may ask the Appeals Council for additional time to file briefs or statements. The

Appeals Council will extend this period, as appropriate, if you show that you had good cause for missing the deadline.

(2) All other rules for filing briefs with and obtaining evidence from the Appeals Council follow the procedures explained in this subpart.

(e) Procedures before the Appeals Council.

(1) The Appeals Council, after receiving a recommended decision, will conduct its proceedings and issue its decision according to the procedures explain in this subpart.

(2) If the Appeals Council believes that more evidence is required, it may again remand the case to an administrative law judge for further inquiry into the issues, rehearing, receipt of evidence, and another decision or recommended decision. However, if the Appeals Council decides that it can get the additional evidence more quickly, it will take appropriate action.

STATEMENT OF THE CASE

Hollins seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit. The basis for federal court jurisdiction in the first instance, the U.S. District Court for the Southern District of Ohio, was pursuant to 42 U.S.C.§ 405(g), following a final decision by the Commissioner.

Hollins petitions for a *writ of certiorari* to review the split opinion of the Sixth Circuit, affirming the decision of the District Court, which affirmed the decision of the

Commissioner. The following facts are material to the questions presented:

Petitioner filed for social security disability benefits as a disabled widow. The ALJ denied Hollins' claim, finding she had severe physical impairments which limited her to light work physically, but that her mental limitations were not disabling, and without ruling on the issue of her literacy (Apx. at 91a-118a). On appeal, Hollins raised two issues: 1) The ALJ improperly evaluated petitioner's literacy in that if she was illiterate then her limitation to "light" work activity made her conclusively "disabled" under the Act; and 2) The ALJ did not consider whether Hollins' combined impairments met or equaled a Listing. The Magistrate agreed, and recommended the matter remanded under sentence four of 42 U.S.C. § 405(g) for re-evaluation of those two issues and to consider specifically whether the record contained evidence sufficient to address the claim of illiteracy or "whether some additional evaluation of that [literacy] claim [was] necessary" (Apx. at 86a, 79a-87a). No party objected to the Magistrate Judge's report and recommendation (Apx. at 79a-87a). The District Court then ordered the matter remanded (Apx. at 75a-78a). No party appealed from the District Court's order of remand. No other issues were addressed.

On remand, the Appeals Council instructed the ALJ to hold "further proceedings consistent with the order of the court" and to "develop the record pursuant to 20 C.F.R. §§ 404.1512-404.1518," which define what constitutes evidence in a Social Security claim (Apx. at 73a-74a). The ALJ, however, *sua sponte* and without notice, reconsidered petitioner's physical limitations. Hollins timely objected, arguing that the doctrines of law of the case, issue preclusion, and claim preclusion prevented such action. The ALJ again denied Hollins' claim, now finding her illiterate yet, on the

same essential evidence, finding that she suddenly lacked any severe physical impairments (Apx. at 36a-72a). Hollins exhausted her appeals (Apx. at 31a-35a). The District Court affirmed the Commissioner's decision (Apx. at 16a-30a). The Court of Appeals affirmed, with Judge Dowd dissenting (Apx. at 3a-15a).

In her appeals, petitioner argued that the administrative determination about her physical residual functional capacity in *Hollins I* was the law of the case and was binding on the Commissioner on remand from the District Court, absent a timely appeal to the Court of Appeals by the Commissioner. Hollins also argued that the decision in *Hollins I* was not subject to reconsideration under the doctrine of issue preclusion and that the District Court decision involved a matter the parties had not raised in *Hollins I* and thus had waived as an issue. The Sixth Circuit rejected those arguments, holding that the District Court decision in *Hollins I* was not a decision on the merits of all issues, and that the Commissioner's regulations allowed the ALJ, on remand from federal court, to consider any issues, whether or not previously raised or adjudicated (Apx. at 3a-15a).

REASONS FOR GRANTING THE PETITION

This case presents a significant issue of national importance in thousands of Social Security claims heard in district court annually because it creates a conflict between the circuits on what constitutes the law of the case, which in turn impinges on claimants' rights to procedural due process. The decision of the Sixth Circuit conflicts with decisions in at least six Courts of Appeals and with this Court in *Sullivan v. Hudson*, 490 U.S. 877 (1984) regarding the law of the case, the appealable nature of sentence four remands under 42 U.S.C. § 405(g), and the applicability of 20 C.F.R. §

404.983. The Sixth Circuit's opinion lets the Commissioner reconsider any issue at any time, while binding the claimant to all decided issues at all times. Such a decision circumvents the decision of a higher court, ignores established law of the case doctrine, and renders the appellate process a futility.

This Court has recognized two types of remands in Social Security claims under 42 U.S.C. § 405(g), sentence four and sentence six. *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). Under sentence four, judicial review of a final decision of the Commissioner is complete when the district court affirms, modifies, or reverses the Commissioner's decision, with or without a remand. Under sentence six, the court orders a remand to take additional evidence if there is new and material evidence and good cause exists for not having incorporated it into the record. *Ibid.* A sentence four remand order is final and immediately appealable. *Forney v. Apfel*, 524 U.S. 266 (1998); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Shalala v. Schaefer*, 509 U.S. 292 (1993).

The Commissioner may not raise on remand matters the district court did not expressly include in its sentence four remand. When an appellate court has remanded a case, the trial court must proceed according to the mandates and law of the case as established by the appellate court. *Hanover Ins. Co. v. American Engineering Co.* 105 F.3d 306, 312 (6th Cir. 1997), *quoting Petition of U.S. Steel Corp.* 470 F.2d 489, 493 (6th Cir. 1973), *cert. den.* 414 U.S. 859 (1973). The mandate leaves open to the lower tribunal only those issues not expressly or impliedly disposed of on appeal. *Youghiogheny and Ohio Coal Co. v. Milliken,* 200 F.3d 942, 950 (6th Cir. 1999). The law of the case or mandate doctrine makes a district court decision binding on all parties.

Where a remand order expressly states the terms of the remand, then neither the Appeals Council nor the ALJ may revisit previous determinations on other issues. *Chrupcala v. Heckler*, 829 F.2d 1269 (3d Cir. 1987); *Ruiz v. Apfel*, 24 F.Supp. 2d 1045 (C.D. CA 1998). The Sixth Circuit acknowledged that the original remand order was for such a limited, specific purpose (Apx. at 4a). This Court has stated that "deviation from the court's remand order in subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson, supra,* at 886; *accord, Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967). An ALJ may not deviate from a clear remand order by raising issues beyond the scope of the unappealed remand order. *Youghiogheny and Ohio Coal Co., supra.*

The Court in *Chrupcala* observed that "[o]ur decision today respects the important concept of finality which, "as embodied in such doctrines as collateral estoppel and res judicata, is '[a] fundamental precept of common law adjudication, . . .' " (citations omitted)." *Chrupcala* at 1273. As *Ruiz* also noted, "nor [does] the Appeals Council order vacating the prior decision and remanding the case 'for further proceedings consistent with the order of the court' suggest that review beyond the scope of the court's order was permitted or contemplated." *Id.* at 1050. As in *Ruiz,* the ALJ in Hollins had no basis to review issues already determined in petitioner's favor. The *Ruiz* court specifically observed its doubt as to the applicability of 20 C.F.R. § 404.983, observing that the regulations, including § 404.983, provided that the ALJ had to follow the Appeals Council's order "and may [not] take any additional action that is not inconsistent with the Appeals Council's remand order[,] 20 C.F.R. §§ 404.983, 404.977[,]" and that "the Appeals Council remand order cannot reasonably be construed to authorize a review beyond that comprehended by the court's

order." *Ruiz* at 1050-1051, fn. 7. That reasoning applies in all sentence four remands.[1] The law of the case makes the decision of the court final absent any appeal.

A final judgment on the merits also precludes relitigation of matters that were or could have been raised in the prior litigation. Thus, to the extent the panel's opinion allowed relitigation of an issue that was or could have been litigated, that too conflicted with Supreme Court authority. *Rivet v. Louisiana*, 522 U.S. 470 (1998): *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). The Court of Appeals decision allowed only one party, the Commissioner, at her own discretion, to raise on remand an issue the district court did not discuss in its remand order. The Sixth Circuit found that the issue of petitioner's physical residual functional capacity was not raised in *Hollins I* (Apx. at 6a).[2] In a Social Security claim, if a party does not raise an issue, and a sentence four remand follows without objection or appeal, that issue is waived. Failure to object to a report and recommendation waives both the right to have the district judge review the report and recommendation *de novo* and the right to appeal the decision of the district court adopting the

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[1] Here the Appeals Council gave remand instructions similar to that in *Ruiz* (Apx. at 73a-74a). Neither the District Court, the Commissioner nor the Appeals Council ever invoked 20 C.F.R. § 404.983 as a basis for part of the remand in *Hollins I*. The Appeals Council only instructed the ALJ to follow 20 C.F.R. §§ 404.1512-404.1518, not 20 C.F.R. § 404.983, which the ALJ *sua sponte* invoked in his decision on remand.

[2] Petitioner argued below, and still maintains, that the issue of her physical residual functional capacity was timely raised and was a necessary predicate to her success on appeal in *Hollins I* and that no party appealed from the necessary ruling implicit in *Hollins I*.

report and recommendation. *Thomas v. Arn,* 728 F.2d 813 (6th Cir. 1984), *aff'd* 474 U.S. 140 (1985).

Now, the decision of the Sixth Circuit allows the Commissioner to reconsider any issue in a sentence four remand, ostensibly based on 20 C.F.R. § 404.983. However, 20 C.F.R. § 404.983 does not apply to sentence four remands under 42 U.S.C. § 405(g). Logically, the provisions of that regulation can apply only to cases involving a sentence six remand. In a sentence six remand the district court does not affirm, modify, or reverse the Commissioner's decision, or in any way rule on the correctness of the administrative determination. *Finkelstein, supra.* Instead, the court orders a remand because new, previously unavailable and potentially determinative evidence has emerged. *Ibid.* Thus, the district court does not "rule" on any findings but simply remands the matter for further proceedings. The Commissioner must reconsider the entire case and must return to the district court to "file with the court any such additional or modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based." 42 U.S.C. § 405(g). A new, complete judicial review proceeds after the remand is returned to the Court. Sentence six remands envision the Commissioner re-evaluating the entire claim, not just the narrow type of issues that may be identified in a sentence four remand, thus giving the provisions of 20 C.F.R. § 404.983 a necessary function.

A remand under 42 U.S.C. § 405(g) also vests the parties with certain appellate rights. If the parties do not appeal, they waive those rights completely. Applying 20 C.F.R. § 404.983 to sentence four remands results in the Commissioner having exclusive authority to circumvent, or even overrule, the decision of any appellate court from which

she has not filed a timely appeal. It also leaves any decision of any court remanding a Social Security case for legal re-evaluation on any specific issue(s) subject to re-evaluation on all issues, theoretically including a decision of this Court. When a sentence four district court remand becomes final, with specific instructions about the scope of the remand, and no timely appeal occurs, the entire case is final except the issues raised on appeal which provide the basis of the scope of the remand.

The Sixth Circuit conceded both that the issue here was limited and that the ALJ "did not merely reconsider the specific issues addressed by the district court's opinion" (Apx. at 4a). As such, the Court of Appeals wrongly applied 20 C.F.R. § 404.983. The District Court in *Hollins I* did not vacate the entirety of the ALJ decision: It vacated the prior decision only as to the issues decided, and affirmed as to all other findings. One cannot rationally argue that 20 C.F.R. § 404.983 allows the Commissioner to reconsider all issues in a sentence four remand or to circumvent *Hudson, Rivet, and Moitie, supra*. Raising issues *sua sponte* and without notice denies claimants' rights to procedural due process. *Chrupcala*, *supra*, at 1273-1274. And, allowing the Commissioner to reconsider all issues fully, regardless of the direction of the court, the type of remand involved or the expectations of the parties, and without a timely appeal, eliminates the essential difference between sentence four and sentence six remands recognized by this Court.

The Sixth Circuit's interpretation of 20 C.F.R. § 404.983 will also overburden the Courts. Federal courts review over 11,000 Social Security appeals annually, with

about half of those resulting in remands.[3] Now, plaintiffs will need to raise and preserve all issues, regardless of whether error existed. In *Hollins I*, for example, petitioner would have needed to raise both the ALJ's legal errors and the ALJ's favorable finding about her physical residual functional capacity, then argue why substantial evidence supported the favorable ruling. To obtain judicial review of the contested issues, claimants would need to raise, and courts would need to rule affirmatively on, numerous uncontested issues, all to protect the issues considered on remand. And, where a district court did not affirmatively rule on the favorably decided matters, a flood of appeals to the Courts of Appeals could well ensue, all to obtain rulings on matters raised solely to protect the terms of a remand.

Adopting the Sixth Circuit's interpretation of 20 C.F.R. § 404.983 creates another unacceptable result: It renders all decisions non-final, regardless of what a Court says in a remand order, unless and until the Commissioner has her desired outcome. This Court specifically rejected that exact result in *Schaefer*, *supra*, at 297-298. The Sixth Circuit decision also gives the Commissioner exclusive and unfettered control to decide what issues to consider or reconsider, to circumvent the appellate process, and to ignore the explicit dictates of a Court. Claimants could never expect any decided matters to be final, leaving them unable to prepare their cases. For example, Hollins relied on the issue of her physical residual functional capacity as having been finally decided.

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[3] According to the Office of Disability there were federal court decisions in 12,011 Social Security appeals in fiscal year (FY) 2000 and 11,592 federal court decision in FY 2001. FY 2000 decisions included orders of remand in 48% of the cases; FY 2001 decisions included remands in 58% of the decisions.

Between the first ALJ decision in May, 1996, and the remand hearing in July, 1999, where the ALJ *sua sponte* raised the issue of her physical residual functional capacity, without notice, Hollins sought no specialist care or evaluation. When the ALJ first raised the issue then, some 3 years later, Hollins could not retroactively create medical records, seek medical care, or obtain specialist evaluations.

As one court noted, petitioner's expectations were entirely reasonable:

> Plaintiff's expectation, that there were certain issues that had been settled during the prior proceeding, was reasonable under the law of the case doctrine. In *Clarke v. Bowen*, 843 F.2d 271, 276 (8th Cir. 1988), in a dissenting opinion, Judge Larson wrote: "The law of the case doctrine prevents the relitigation of the settled issues in a case, thus protecting the settled expectations of the parties, ensuring uniformity of decision, and promoting judicial efficiency. *Little Earth of the United Tribes, Inc. v. HUD*, 807 F.2d 1433, 1441 (8th Cir. 1986). The Secretary has acknowledged in prior cases that he is bound on remand to follow the law of the case doctrine, *Hillhouse v. Harris*, 547 F.Supp. 88, 92 (W.D. Ark.1982), *aff'd*, 715 F.2d 428 (8th Cir.1983) . . . "
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> * * * * *
>
> I believe it is fundamentally unjust for the Secretary to "reshuffle the cards"--particularly

without notice--. . . . See also, *Soth v. Chater*, 937 F.Supp. 840 (S.D. Iowa 1996).

Ozbun v. Callahan, 968 F.Supp 478, 480 (S.D. Iowa 1997). *See also Chrupcala* at 1273-1274 (reconsidering issues takes away the finality normally afforded by adjudication and raises issues of substantive and procedural due process concerning the right to be heard in a meaningful manner and receive adequate notice of the issues). A district court does not lack options when issuing an order of remand. The court can expressly state that no law of the case is to be considered from the first ALJ decision, as the Court did in *Steahr v. Apfel,* 151 F.3d 1124 (8th Cir. 1998). The Court can specifically state that remand proceedings be in accordance with 20 C.F.R. § 404.983, as the Court did in *Plummer v. Apfel*, 186 F.3d 422 (3d Cir. 1999). Clearly expressing the intent that a sentence four remand be fully reconsidered leaves no dispute as to the remand procedure. If the district court expressed that intent in *Hollins I*, the parties would have had notice as to the issues, and petitioner could have exercised her right to appeal to the Court of Appeals to challenge that ruling.

The Sixth Circuit opinion also conflicts with appellate court opinions from several other circuits. When an appellate court has either expressly or by necessary implication decided an issue, that decision is binding in all later proceedings in the same case. *Key v. Sullivan*, 925 F.2d 1065 (7th Cir. 1991); *Horrell v. Chater*, 54 F.3d 787 (10th Cir. 1995); *Fogel v. Chestnutt*, 668 F.2d 100, 108 (2d Cir. 1981), *cert den.* 459 U.S. 828 (1982). "If the [Commissioner] [is] dissatisfied with any part of the district court's order, the remedy [is] to appeal the case and not, under the guise of a new hearing, to relitigate a question already finally decided by the district court." *Hooper v. Heckler*, 752 F.2d 83, 88 (4th Cir. 1985). The Commissioner may not undertake an expanded review of

the issues and record on remand. *Chrupcala*, *supra*, at 1274. Rather, the ALJ must "conform any proceeding on remand to the principles set forth in the appellate opinion." *Wilder v. Apfel,* 153 F.3d 799, 803 (7th Cir. 1998). Holding otherwise "would render the judicial review process a nugatory exercise in futility." *Holst v. Bowen*, 637 F.Supp. 145, 147 (E.D. WA 1986). *See also, Clarke v. Bowen*, 843 F.2d 271 (8th Cir. 1998) (law of the case recognized but not applied due to failure to preserve issue or raise issue in district court); *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967) (upholding binding nature of prior proceedings on Commissioner before enactment of 20 C.F.R. § 404.983).

Finally, the decision below also lacked support under two federal statutes. Under 42 U.S.C. § 405(g), the sentence four remand provision is followed by sentence five, which states that "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive....." In light of sentence four, and the limited scope of a sentence four remand, sentence five of 42 U.S.C. § 405(g) shows that any finding of fact not appealed from or set aside due to a lack of substantial evidence is conclusively decided. That the "conclusive finding" sentence comes between sentence four and sentence six shows that it applies only to sentence four, not sentence six, remands. The phrase "shall" further shows that any finding not appealed or ruled upon is conclusive. Additionally, on the hearing of any appeal, a court must issue judgment without concern for harmless errors, pursuant to 28 U.S.C. § 2111. *Doe v. New York City Dept. of Soc. Svcs.*, 709 F.2d 782 (2d Cir. 1983), *cert den. sub nom Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983). Here, Hollins' literacy was reviewable by the District Court only if it was not harmless error. Because her physical limitation was a decided issue in *Hollins I*, the issue

of her literacy was not harmless; it was the determinative issue in her claim.

The Court of Appeals decision conflicts with numerous decisions in other jurisdictions, departs from the precedent and opinions of this Court about the appealable nature of a remand order, and ignores the law of the case or mandate doctrine. The Sixth Circuit's interpretation and application of 20 C.F.R. § 404.983 is inconsistent with this Court's decisions and with the language of 42 U.S.C. § 405(g), resulting in a denial of due process to claimants. For these reasons, and because of the large number of Social Security claims heard annually by the federal courts, Hollins submits this Court should grant a *writ of certiorari* to review the opinion of the Court of Appeals.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3535

[Filed January 10, 2003]

LINDA HOLLINS, Plaintiff-Appellant,	)
v.	)
COMMISSIONER OF SOCIAL SECURITY, Defendant-Appellee.	)

BEFORE: KENNEDY and MOORE, Circuit Judges; and DOWD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Hon. David D. Dowd, Jr., Senior United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Dowd would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3535

[Filed October 17, 2002]

LINDA HOLLINS, Plaintiff-Appellant,

v.

LARRY G. MASSANARI, Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

JUDGES:

Before: KENNEDY and MOORE, Circuit Judges; DOWD,* District Judge.

* Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

CORNELIA G. KENNEDY, Circuit Judge. Plaintiff-appellant Linda Hollins seeks review under 42 U.S.C. § 405(g) of the Commissioner of Social Security's decision denying her widow's insurance benefits.

In the first administrative adjudication of this case, the administrative law judge determined that Hollins was not disabled, and had a residual functional capacity for only limited light work. Hollins appealed the finding of no disability, arguing that there was not substantial evidence to support the ALJ's decision. Specifically, she argued that the ALJ's determinations were wrong because: (1) her combined physical and mental impairments were equivalent to Listing 12.05C; (2) she is illiterate. The district court agreed that the ALJ had mishandled the equivalency issue, but was unwilling to rule that Hollins's impairments were in fact equivalent to Listing 12.05C. Instead, the court remanded the case to the ALJ for reconsideration of the equivalency issue. The district court also agreed that the ALJ had mishandled the question of Hollins's literacy, and remanded for consideration of that issue as well. *Hollins v. Apfel*, C-2-97-352 (S.D. Ohio 1997) (*Hollins I*).

Upon remand, the ALJ did not merely reconsider the specific issues addressed by the district court's opinion. Instead, the ALJ conducted an entirely new hearing on the question of Hollins's disability. The ALJ determined that he had erred in his previous evaluation of Hollins's physical impairments, and conducted a new examination of the evidence on that issue. Based on this new inquiry, the ALJ concluded that Hollins did not have any severe physical impairments and therefore once again found no disability.

Hollins once again appealed to the district court on the grounds that the ALJ was bound by his earlier determination that Hollins did have severe physical impairments. The district court disagreed, noting that under 20 C.F.R. § 404.955, the prior decision of the ALJ was no longer binding because Hollins had sought judicial review.[1] *Hollins v. Apfel*, 160 F. Supp. 2d 834 (S.D. Ohio 2001) (Hollins II). That issue has not been appealed. Hollins also argued that the district court's initial decision in *Hollins I* established the law of the case as to the issue of her physical capacity, or, in the alternative, that *Hollins I* had claim preclusion and/or issue preclusion effect. Again, the district court disagreed, and it is on these grounds that Hollins appeals. *Id.* We affirm the district court's decision.[2]

In order for Hollins to succeed under any legal theory, the district court must have issued a final decision on the

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[1] 20 C.F.R. § 404.955 provides in pertinent part: "The decision of the administrative law judge is binding on all parties to the hearing unless . . . (b) you or another party requests a review of the decision by the Appeals Council within the stated time period, the Appeals Council denies your request for review, and you seek judicial review of your case by filing an action in Federal district court."

[2] The dissent's argument that this is "the entire question on appeal" conflates the preclusive power of the ALJ's determination with the preclusive power of the district court's opinion in *Hollins I*. The former question, which Hollins does not raise before this court, is conclusively answered by 20 C.F.R. § 404.955, which clearly makes the ALJ's determination not final and therefore not binding under any of Hollins's legal theories. The latter question is the subject of this appeal.

merits regarding her physical impairments and residual functional capacity. *See Hammer v. Immigration and Naturalization Serv.*, 195 F.3d 836, 840 (6th Cir. 1999) (noting that issue preclusion only applies if "the issue was actually litigated and decided in the prior action" and "resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation."), *cert. denied*, 528 U.S. 1191, 146 L. Ed. 2d 105, 120 S. Ct. 1247 (2000); *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995) (noting that claim preclusion only applies if there has been "a final decision on the merits"), *cert. denied*, 517 U.S. 1220, 134 L. Ed. 2d 949, 116 S. Ct. 1848 (1996); *Quern v. Jordan*, 440 U.S. 332, 347 n.18, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979) (noting that "the doctrine of law of the case only comes into play with respect to issues previously determined.").

Hollins I did not constitute a decision on the merits regarding Hollins's residual functional capacity. The district court's opinion addressed only the two narrow errors committed by the ALJ in the initial hearing. The merit of the ALJ's determination regarding Hollins's physical capacity was assumed for the purposes of evaluating Hollins's claims regarding the ALJ's treatment of her combined mental and physical capacity. In other words, the district court held that *given* the ALJ's findings regarding physical capacity, the ALJ should have considered the combined effect of her mental and physical impairments and compared that full picture to Listing 12.05C. The fact that the ALJ made certain factual findings is essential to the district court's holding, but the truth of those findings is not.

Hollins also argues that the ALJ did not have the authority to exceed the scope of the remand order in *Hollins I* by opening an entirely new hearing. Under the "mandate rule," administrative agencies generally are obligated to follow the mandates set forth in a federal court decision. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999). Hollins does not dispute that the ALJ followed the district court's directive to reconsider Hollins's illiteracy and mental impairments. Rather, Hollins argues that the ALJ was limited to deciding only the specific issues indicated in the district court's remand order; namely, whether her mental impairments equal Listing 12.05C, and whether she was illiterate.

In some Social Security cases, district courts will include detailed instructions concerning the scope of the remand and the issues to be addressed. In such cases, "deviation from the court's remand order in subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886, 104 L. Ed. 2d 941, 109 S. Ct. 2248 (1984). *See also Mefford v. Gardner*, 383 F.2d 748, 758 (6th Cir. 1967)(noting "the general rule that, on the remand of a case after appeal, it is the duty of the lower court, or the agency from which appeal is taken, to comply with the mandate of the court and to obey the directions therein without variation and without departing from such directions."). These cases stand for the proposition that the administrative law judge may not do anything expressly or impliedly in contradiction to the district court's remand order. These cases do not preclude the ALJ from acting in ways that go beyond, but are not inconsistent with, the district court's opinion. Reconsideration

of Hollins's physical impairments was not inconsistent with any express or implied order of the district court.

It is true that the district court's remand order in this case did not direct the ALJ to reconsider the evidence of Hollins's physical capacity. However, the ALJ did not need a mandate from a federal court to consider this issue. His power to do so derives from the legislative grant of authority contained in the Social Security Act. The Social Security Administration has promulgated regulations stating that, upon remand by a federal court, "any issues relating to your claim may be considered by the administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in your case." 20 C.F.R. § 404.983. The ALJ therefore did not act outside his authority in ordering a de novo review of Hollins's physical capacity.[3]

For the forgoing reasons, we affirm the opinion of the district court.

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[3] Because the ALJ revisited his prior findings *sua sponte*, the issue before this Court is whether this ALJ possessed the authority to do so, and not whether the Commissioner waived his right to object or appeal the ALJ's original findings regarding Hollins's residual functional capacity.

DISSENT:

DAVID D. DOWD, JR., District Judge, dissenting. I respectfully dissent from the majority's opinion because, in my view, the issue of residual functional capacity ("RFC") was a *decided* issue which should not have been disturbed during the administrative proceedings following remand of *Hollins I*.[1] My reasoning follows.

The majority holds that it was not error for the ALJ to completely re-evaluate appellant's RFC on remand because "*Hollins I* did not constitute a decision on the merits regarding Hollins's residual functional capacity." Opinion, at 3. This conclusion, however, fails to recognize the *significance* of one of the "two narrow errors committed by the ALJ," *id.*, which triggered the remand, namely, the "mishandling [of] the question of Hollins's literacy[.]" Opinion, at 2. As properly argued by appellant's counsel, literacy is only an issue if the RFC is for light work. Under the Vocational Rules (the "grids"), literacy comes into play in only two situations: (1) where an individual has an RFC for sedentary work and is a "younger individual;" or (2) where, as here, an individual has an RFC for light work and is "closely approaching advanced age."

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[1] I disagree with the majority's statement that the question of whether the ALJ was bound by his earlier determination "has not been appealed." Opinion, at 2. I believe that is the *entire* question on appeal. Law of the case, claim preclusion and issue preclusion are merely the legal theories advanced by the appellant to support her assertion that the ALJ *was* bound.

The initial decision of the ALJ issued in May 1996 found that Hollins, at age 51, was "closely approaching advanced age," had only "limited" education and no past relevant work experience or transferable skills. The ALJ concluded that, if she were capable of performing the full range of light work (which he also concluded she was not), Hollins would be "not disabled" under Rule 202.10, Table No. 2, Appendix 1, Subpart P, Regulations No. 4. Admin. R. at 17, PP 8-12.[2] It was precisely at this point in the analysis where, in the *Hollins I* court's view, the ALJ made one of his "narrow errors" by completely failing to examine the question of literacy. Had he analyzed Hollins's literacy and determined that she was illiterate, he would have had to apply *not* Rule 202.10, but Rule 202.09 which, given her age and lack of relevant work experience, would have directed a finding of "disabled."

The *Hollins I* court remanded, in part, so that the ALJ could make the literacy determination so critical to the selection of the appropriate vocational rule. Therefore, the remand *assumed* that the RFC for light work had been unchallenged. This, in fact, was a correct assumption. The Commissioner had not argued to the district court that the RFC finding of light work was incorrect. In addition, the Commissioner filed no objections to the magistrate judge's recommendation in *Hollins I*, a recommendation which was then adopted by the district court in its remand order. Nor did

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[2] Considering that Hollins had only non-exertional limitations, the ALJ ultimately concluded, based on the testimony of a vocational expert, that there was a significant number of jobs in the national economy which she could perform. Admin. R. at 18, P13.

the Commissioner appeal to this Court the district court's final, appealable, sentence four remand order.[3] In short, the Commissioner did nothing to suggest that he disagreed with an RFC finding of light work. In fact, it was not the Commissioner who raised the issue even on remand. It was the ALJ who, *sua sponte*, decided to revisit his RFC determination. He declared that he was making a re-determination because he had made a mistake in his initial determination by applying principles that had *subsequently* been rejected by the Social Security Administration, as evidenced by new rulings.[4]

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[3] "The fourth and sixth sentences of 42 U.S.C. § 405(g) delineate the district court's authority to review a final decision of the [Commissioner]. . . . Section 405(g), thus, plainly authorizes two types of remand: (1) a post-judgment remand in conjunction with a decision affirming, modifying, or reversing the decision of the [Commissioner] (a sentence-four remand); and (2) a pre-judgment remand for consideration of new and material evidence that for good cause was not previously presented to the [Commissioner] (a sentence-six remand)." *Faucher v. Secretary of HHS*, 17 F.3d 171, 173-74 (6th Cir. 1994). *See also, Melkonyan v. Sullivan*, 501 U.S. 89, 99-100, 115 L. Ed. 2d 78, 111 S. Ct. 2157 (1991) (there are only two possible kinds of remand under the statute). A sentence four remand order is immediately appealable to this Court. In the instant case, there was no appeal from the *Hollins I* ruling.

[4] Although neither party has raised this issue, I believe it was error to give retroactive application of a new agency ruling, where that application renders incorrect an as-yet unchallenged finding that was correct under the rulings in effect at the time it was made.

Retroactivity is typically "looked upon with disfavor." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 224, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). Two criteria must generally be satisfied in order to apply an administrative agency rule retroactively. First, the agency must express its clear intention that such rules be applied retroactively. *See id. at 208.* Second, Congress must have given the agency authority to promulgate retroactive rules. *See id.*

In November 1998, in re-evaluating appellant's functional restrictions, the ALJ pointed to SSR 96-7p and 96-8p, *see*, 61 Fed. Reg. 34474, 34483, which were promulgated on July 2, 1996, that is, *after* his original disability findings were made. SSR 96-7p, "Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements," stated that it superseded SSR 95-5p, "Considering Allegations of Pain and Other Symptoms in Residual Functional Capacity and Individualized Functions Assessments and Explaining Conclusions Reached." SSR 95-5p had superseded SSR 88-13, "Evaluation of Pain and Other Symptoms." Because SSR 95-5p declared its purpose to be the restatement and clarification of "longstanding policies of the Social Security Administration," at least one court has applied SSR 95-5p retroactively when it reviewed an ALJ determination that was made *before* the ruling was promulgated. SSR 96-7p, which now supersedes 95-5p, makes no similar mention of "longstanding policy" or retroactivity. *Compare*, SSR 00-3p (May 15, 2000) which specifically discusses how to handle already-allowed and pending claims in light of its deletion of a listing relating to obesity. SSR 96-7p does state that its purpose is to clarify, but that clarification relates to the need for credibility assessments when considering statements about pain and other symptoms. SSR 96-8p, "Assessing Residual Functional Capacity in Initial Claims," similarly makes no mention of longstanding policy or retroactivity.

In my view, the remand order of *Hollins I* rendered the unchallenged RFC determination final notwithstanding the fact that the order did not expressly verbalize that conclusion.[5] I would conclude that the ALJ exceeded the scope of the

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Since no party raised this issue, I will not address it further. However, it seems likely that, in view of the fact that the Appeals Council refused review of the original determination on March 12, 1997, nine months *after* the promulgation of the new rulings, it did not believe the rulings needed to be retroactively applied to correct any error of the ALJ. Therefore, it seems unfair to allow the ALJ to suddenly decide to upset a settled RFC determination by applying the new rulings which even the Appeals Council had never applied.

[5] Certainly the district court was free to assume that the agency which deals with these matters on a daily basis would, even without a direct reference, identify the nuance and understand the significance of a remand order directing that a determination be made as to Hollins's literacy *so that a proper determination could be made with respect to which of the vocational rules to apply*.

remand.[6] He should have left undisturbed the original RFC determination for "light work."[7]

In addition, although appellant has not raised this issue, I note that the ALJ's second determination, made in

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[6] Not only did he exceed the scope of the remand, he did so with an absurd result. The ALJ ordered Hollins to undergo a new medical examination, which he was free to do in order to ascertain any *prospective* changes in her condition since he had last ruled. On the advice of counsel who believed the ALJ was acting beyond the scope of the remand order, Hollins did not appear for the examination. (I note that there is nothing in the administrative record which would suggest that counsel could have guessed that the ALJ asked for a new medical consultation because he was contemplating application of *new* agency rulings which would change the RFC determination.) The ALJ then exercised his discretion under 20 C.F.R. § 404.1518 to apply a presumption that Hollins was not disabled which, when coupled with his application of completely new standards set forth in the new rulings, resulted in the ludicrous conclusion that Hollins was capable of *all* exertional levels of work, including *heavy* work. In my view, the ALJ abused his discretion by applying this harsh presumption under circumstances where, as here, Hollins did not appear on the advice of counsel. Clearly, she should not be punished for taking her counsel's advice, misguided as it may, arguably, have been.

[7] I have no quarrel with the majority's statement that an ALJ is not precluded "from acting in ways that go beyond, but are not inconsistent with, the district court's opinion." Opinion, at 4-5. However, I believe the ALJ *did* act in a way that was inconsistent with the district court's opinion, given the significance of the remand order which specifically required an examination of Hollins's literacy, an issue which had great significant (for "grid" purposes) given her age and the RFC for light work.

November 1999, incorrectly found that Hollins was *still* only "closely approaching advanced age," Admin. R. at 183, P11, when, in fact, she was already 55 years old, an age categorized for disability purposes as "advanced age."[8] Had the ALJ properly left in place his first RFC determination, as of November 1999, Hollins's situation would have been governed by Rule 202.01 and a finding of "disabled" would have been directed whether or not she was found to be illiterate.

That having been said, a finding of illiteracy, even coupled with an incorrect age of 54, would have entitled Hollins to a determination of "disabled" *provided* the RFC was for light work. Thus, it was very significant that the ALJ *sua sponte* decided to throw out the earlier RFC determination and then, harshly, exercised his discretion to apply a negative presumption to defeat a finding of disability.

I respectfully dissent.

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[8] Hollins was only 54 years old in July 1999 when the ALJ conducted his hearing following the remand. However, her birthday was on August 28, 1999. Therefore, she was 55 years old as of the end of her prescribed period, i.e., August 31, 1999, and by the time the ALJ rendered his second determination in November 1999.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case Number C2-00-349

[Filed March 12, 2001]

Linda Hollins	)
	)
v.	)
	)
Kenneth S. Apfel, Commissioner of Social Security,	)
	)
	)

Judge Smith
Magistrate Judge King

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the March 12, 2001 Opinion and Order, the Plaintiff's motion for summary judgment is DENIED; the Commissioner's motion for summary judgment is GRANTED. The decision of the Commissioner of Social Security is AFFIRMED and this action is hereby DISMISSED.

Date: **March 12, 2001** **Kenneth J. Murphy, Clerk**

/s/ _____
By Sherry Nichols/ Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Civil Action 2:00-CV-349

[Filed March 12, 2001]

LINDA HOLLINS,	)
Plaintiff,	)
	)
vs.	)
	)
KENNETH S. APFEL, Commissioner of Social Security,	)
Defendant.	)

JUDGES:
George C. Smith, Judge, United States District Court.
Magistrate Judge King.

OPINION AND ORDER

Plaintiff Linda L. Hollins filed this action seeking review under 42 U.S.C. § 405(g) of a final decision of the Commissioner of Social Security denying her application for widow's insurance benefits. This matter is now before the Court on the cross-motions of the parties for summary judgment.

Plaintiff applied for widow's benefits on October 17, 1994, alleging that she has been disabled since March 1st of that year as a result of back and leg pain and illiteracy. In order to qualify for widow's insurance benefits, plaintiff must

establish that she became disabled sometime during the period between her 50th birthday and the seventh year following the death of her spouse. 42 U.S.C. § 402(e)(1)(B). In this case, that period extended from August 1994 to August 1999.

Following an administrative hearing, an administrative law judge determined that plaintiff was not disabled because, despite her borderline intellectual functioning, major depression, and recurrent back and leg pain due to probable strain or mild arthritis, she nevertheless had the residual functional capacity to perform simple, repetitive, low-stress jobs that required no more than light exertion, and that did not require reading or writing, more than limited contact with supervisors and coworkers or concentration on a single task for more than 15 minutes at a time. Plaintiff thereafter sought review in this Court. *Linda L. Hollins v. Kenneth S. Apfel*, C-2-97-352 (S.D. Ohio). On January 14, 1998, this Court remanded the action to the Commissioner for further proceedings pursuant to sentence 4 of 42 U.S.C. § 405(g). Specifically, the matter was remanded for consideration of whether or not plaintiff's mental impairment equalled Listing 12.05C and of plaintiff's claim of illiteracy. *Id., Report and Recommendation*, at 7-8 (November 26, 1997).

Following remand, the administrative law judge rejected his previous finding that plaintiff was limited to only a reduced range of light work, explaining that that finding was based on inappropriate, non-medical, considerations and limited objective findings and treatment history. *A.R.* 173-74. Although the administrative law judge referred plaintiff to a consultative evaluation, she declined to participate in such evaluation, based on advice of counsel. *A.R.* 252-53, 266.

In his decision on remand, the administrative law judge found that plaintiff suffers the severe non-exertional impairments of borderline intellectual functioning, a reading disorder, an adjustment disorder with depressed mood, and a personality disorder not otherwise specified; he also found that plaintiff does not suffer a severe physical impairment. Because, according to the administrative law judge, plaintiff's non-exertional impairments do not preclude the performance of substantial gainful activity, the administrative law judge concluded that plaintiff was not disabled. It is from that decision that plaintiff now appeals.

Plaintiff was born August 28, 1944. She completed eight grades of formal education in regular classes, *A.R.* 219, and has no prior relevant work experience. *A.R.* 213. The Court will not recount the administrative record generated prior to the order of remand, but instead incorporates by reference the *Report and Recommendation*, which appears at *A.R.* 193-201.

In November 1998, Charles E. Merrill, D.O., plaintiff's treating physician, reported that plaintiff suffers from depression, anxiety, and lumbar pain, although the conditions were stable with treatment. *A.R.* 228. Dr. Merrill recommended a psychological evaluation, *Id.*, and indicated that there was decreased range of motion of the back. According to Dr. Merrill, plaintiff could frequently lift and carry up to 20 pounds, *A.R.* 229, and could stand or walk no more than 4 hours throughout an 8-hour workday, without interruption, but was unlimited in her ability to sit. *Id.* Plaintiff also had a moderate limitation in her ability to bend.

In January 1999, Susan W. West, Ph.D., performed a psychological evaluation of the plaintiff at the request of the state agency. Plaintiff's affect was appropriate and her mood was euthymic with underlying features of depression. *A.R.* 234. She reported thoughts of suicide but denied suicidal ideation or intent. She also reported sleep problems and bouts of tearfulness. *Id.* Plaintiff was alert and oriented to time, place, person and situation. Insight and judgment were appropriate. On the WAIS-III, plaintiff achieved a verbal I.Q. score of 68, a performance I.Q. score of 79, and a borderline I.Q. score of 71. The doctor stated that the scores

> are not considered to be a valid and reliable measure of her current intellectual and cognitive functioning. It would be estimated that her more accurate current level of functioning is in the high borderline to low average range. She has little education and her general fund of knowledge is poor, but she does not appear to have any problems in functioning or carrying out appropriate responsibilities.

A.R. 236. On the Wechsler Memory Scale-III, plaintiff achieved an average score of 89. Dr. West detected no memory deficit. *A.R.* 236. The Wechsler Individual Achievement Test disclosed a reading disorder. Dr. West diagnosed an adjustment disorder with mixed emotional features, an undifferentiated somatoform disorder and a reading disorder, accompanied by a personality disorder, not otherwise specified, with dependent features. Plaintiff's GAF was assessed at 72. According to Dr. West:

> ... It appears that the claimant would be able to relate appropriately with fellow workers and supervisors. The findings indicate that the claimant would be able to understand, follow and remember simple verbal instructions and directions. She would be able to maintain adequate attention and concentration in order to perform simple repetitive tasks, as well as to maintain adequate persistence and pace, if she chose to do so. The findings indicate that the claimant would have minimal impairment in being able to deal with day to day work activity, given her current cognitive and psychological functioning.

A.R. 237.

In September 1999, George Serednesky, Ph.D., reviewed the evidence of record and concluded that the record does not document a mental condition that either meets or equals any of the Listing of Impairments. *A.R.* 239-40.

The supplemental hearing was held on July 19, 1999. Plaintiff, represented by counsel, appeared and testified, as did Julie Morrissey, who testified as a vocational expert. Plaintiff testified that she cannot afford the medication prescribed by Dr. Merrill. She can walk only 1 block and can sit or stand for no more than 30 minutes. She cooks only occasionally, goes shopping no more than 3 times per month, and relies on her son and daughter-in-law, with whom she lives, to perform the housework. She spends a typical day watching television or sitting in the backyard. She performs no yard or garden work. *A.R.* 272-81.

Relying on Dr. Serednesky's opinion, the administrative law judge concluded that plaintiff's mental condition does not equal the severity described in Listing 12.05C of Appendix I to Subpart P of Regulations No. 4 (the "Listing of Impairments"). Moreover, the administrative law judge found that plaintiff's physical impairments do not compromise her ability to work at any exertional level. He concluded that his earlier finding limiting plaintiff to a reduced range of light exertion, made prior to the order of remand, was erroneous because it was based -- not on any medical evidence -- but instead on plaintiff's age and general deconditioning, *i.e.*, factors irrelevant to the determination of residual functional capacity. The administrative law judge also relied on plaintiff's failure to participate in the scheduled consultative medical evaluation. *See* 20 C.F.R. § 404.1518 (failure to attend a consultative examination permits an adverse inference to be made concerning a claimant's disability status). Finally, the administrative law judge also concluded that he was bound by neither the doctrine of administrative *res judicata* nor the doctrine of law of the case in connection with his earlier finding regarding plaintiff's residual functional capacity.

From a mental standpoint, the administrative law judge found that plaintiff

> lacks the residual functional capacity to:
>
> (1) perform other than simple, repetitive tasks (which includes no requirement to follow detailed or written instructions);

> (2) maintain concentration for longer than 15 minutes at a time on a single task (while remaining free to turn her attention to other tasks thereafter);
>
> (3) perform other than low stress job activity (*i.e.*, no jobs involving above average pressure for production);
>
> (4) perform tasks requiring reading or writing skills.

A.R. 179. In this regard, the administrative law judge relied primarily on Dr. West's assessment of plaintiff's ability to perform work-related activities from a mental standpoint. Relying on the testimony of the vocational expert, the administrative law judge found that 7,000 jobs meeting the articulated residual functional capacity assessment would be available to a claimant at the light exertional level, including such jobs as packaging machine operator or small machine operator, and that 8,000 such jobs would be available at the medium exertional level, including such jobs as hand packer or kitchen worker.[1] Accordingly, the administrative law judge concluded that plaintiff was not disabled within the meaning of the Social Security Act. That decision became final when the Appeals Council declined review on February 12, 2000.

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[1] The vocational expert did not use plaintiff's local region in Southeastern Ohio because that region was not representative of the national economy. *A.R.* 285. The vocational expert also testified that the jobs referred to by her exist in proportionate numbers at the national level. *Id.*

Pursuant to 42 U.S.C. § 405(g), judicial review of the Commissioner's decision is limited to determining whether the findings of the administrative law judge are supported by substantial evidence and employed the proper legal standards. *Richardson v. Perales*, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971). Substantial evidence is more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Kirk v. Secretary of Health & Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981), cert. denied, 461 U.S. 957 (1983). This Court does not try the case *de novo*, nor does it resolve conflicts in the evidence or questions of credibility. *See Brainard v. Secretary of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989); Garner v. Heckler, 745 F.2d 383, 387 (6th Cir. 1984).

In determining the existence of substantial evidence, this Court must examine the administrative record as a whole. *Kirk*, 667 F.2d at 536. If the Commissioner's decision is supported by substantial evidence, it must be affirmed even if this Court would decide the matter differently, *see Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983), and even if substantial evidence also supports the opposite conclusion, *see Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc).

In her motion for summary judgment, plaintiff contends, first, that the finding -- made by the administrative law judge during the course of the earlier administrative proceedings -- that plaintiff is limited to a reduced range of light work is binding on all parties, including the Commissioner of Social Security. That finding is significant because a residual functional capacity of light work, when

coupled with a finding of illiteracy in a person over 50 years of age with no prior relevant work history, would mandate a conclusion of disability under the Medical-Vocational Guidelines. Rule 202.09 of Appendix II to Subpart P of Regulations No. 4. Plaintiff's contention in this regard finds no support in the regulations. 20 C.F.R. § 404.955(b).[2] The Social Security Act does provide a measure of administrative *res judicata* in 42 U.S.C. § 405(h).[3] However, only final

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[2] 20 C.F.R. § 404.955 provides in pertinent part:

> The decision of the administrative law judge is binding on all parties to the hearing UNLESS -
>
> * * *
>
> (b) you or another party requests a review of the decision by the Appeals Council within the stated time period, the Appeals Council denies your request for review, and you seek judicial review of your case by filing an action in a Federal District Court [emphasis added.]

Of course plaintiff followed this procedure in instituting the earlier case in this Court. Moreover, 20 C.F.R. § 404.983 makes clear that, following judicial remand, "any issues relating to your claim may be considered by the administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision of your case."

[3] (h) Finality of Commissioner's decision

> The findings and decision of the Commissioner of Social Security after a hearing shall be binding on all individuals who were parties to such hearing.

administrative decisions are entitled to this deference. *See, e.g., Drummond v. Commissioner of Social Security*, 126 F.3d 837, 841 (6th Cir. 1997); *Dennard v. Secretary of Health and Human Services*, 907 F.2d 598 (6th Cir. 1990). The prior judgment of this Court, which reversed the agency's decision under 42 U.S.C. § 405(g) and remanded the action for further proceedings, divested the agency's decision of any such finality under 42 U.S.C. § 405(h).

Plaintiff also argues that the doctrine of the law of the case also limited the Commissioner on remand to consideration of only the two issues referred to in this Court's order of remand. Under that doctrine, a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988). As is perhaps so obvious as to be difficult to perceive, the order of remand issued in the earlier action was a final judgment; this action is not "the same litigation" subject to the doctrine of the law of the case.

The doctrine of collateral estoppel, or issue preclusion, precludes the relitigation of facts or issues that were, or could have been, litigated to final judgment between the parties. *See Herron v. Harrison*, 203 F.3d 410, 417 (6th Cir. 2000). Application of the doctrine, however, assumes that the parties have had a full and fair opportunity to litigate the issue, which was, furthermore, essential to the prior judgment. *Hammer*

> No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. ...

v. INS, 195 F.3d 836, 840 (6th Cir. 1999), cert. denied, 528 U.S. 1191, 146 L. Ed. 2d 105, 120 S. Ct. 1247 (2000). As plaintiff concedes, neither party in the earlier action actually litigated the finding that plaintiff was limited to a reduced range of light work. Plaintiff argues that the Commissioner could have litigated this issue in the prior proceeding, an argument which is not entirely persuasive. *See Rogers v. Commissioner of Social Security, 2000 U.S. App. LEXIS 14042, 2000 WL 799332***5 (6th Cir. 2000) (unpublished). In any event, however, a finding regarding plaintiff's residual functional capacity was not essential to the judgment actually rendered by the Court in the earlier action. *Id.* For all these reasons, then, the Court concludes that the Commissioner did not err when, on remand, the administrative law judge reconsidered the issue of plaintiff's residual functional capacity.

Plaintiff also argues that the administrative law judge failed to incorporate the appropriate limitation on plaintiff's ability to concentrate into the hypothetical posed to the vocational expert. In a Psychiatric Review Technique Form ["PRTF"], *A.R.* 185-88, the administrative law judge indicated that plaintiff "often suffers deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. ..." *A.R.* 188. At the supplemental administrative hearing, plaintiff's counsel asked the vocational expert to assume this limitation, defining "often" as "approximately one third of the time," *i.e.*, "a person is off task a third of the time, not able to concentrate on anything." *A.R.* 287. In response, the vocational expert testified that such a claimant could perform no job. *A.R.* 288. In her motion for summary judgment, plaintiff contends that the administrative law judge erred in failing to incorporate

this limitation into the hypothetical posed to the vocational expert.

The hypothetical posed by the administrative law judge to the vocational expert, and in response to which the vocational expert testified that there exist a significant number of jobs that such a claimant could perform, included the following:

> Limited to simple, repetitive tasks, which includes not having to follow complex, detailed or written instructions. Not required to maintain concentration on any one single task for more than 15 minutes at a time, but remaining free to turn his or her attention to other tasks thereafter. Jobs that one would generally characterize as low-stress in nature, that is, no above average pressure for production and limited or occasional contact only with members of the public, supervisors and co-workers.

A.R. 286. In response, as previously noted, the vocational expert testified that such a claimant could engage in substantial gainful activity which exists in significant numbers in the national economy. In his decision, the administrative law judge specifically found that plaintiff had the residual functional capacity from a mental standpoint to "maintain concentration for [no] longer than 15 minutes at a time on a single task (while remaining free to turn her attention to other tasks thereafter)." *A.R.* 179. He based this finding on Dr. West's psychological assessment, in which she stated that plaintiff "would be able to maintain adequate attention and

concentration in order to perform simple and repetitive tasks, as well as maintain adequate persistence in pace, if she chose to do so." *A.R.* 237. Under these circumstances, the Court concludes that the residual functional capacity assessment found by the administrative law judge is supported by substantial evidence in the record and provided a proper basis for the hypothetical posed to the vocational expert. *See Varley v. Secretary of Health and Human Services*, 820 F.2d 777, 779 (6th Cir. 1987). Regardless of the fact that the PRTF characterized plaintiff's lapses in concentration as "often," and regardless of the definition that plaintiff's counsel chose to impose upon the term "often," the Court concludes that there is substantial support in the record for the administrative law judge's specific finding in this regard. *See also Gieseking v. Secretary of Health and Human Services*, 1994 U.S. App. LEXIS 13396, 1994 WL 228239**7 (6th Cir. 1994)(unpublished).

In short, and having carefully considered the record in this action, the Court concludes that the decision of the Commissioner of Social Security is supported by substantial evidence and must be affirmed.

Plaintiff's motion for summary judgment is DENIED; the Commissioner's motion for summary judgment is GRANTED. The decision of the Commissioner of Social Security is AFFIRMED and this action is hereby DISMISSED.

/s/ _____
George C. Smith, Judge
United States District Court

APPENDIX D

SOCIAL SECURITY ADMINISTRATION
Refer to: TAHBG
290-40-0699
X-Ref: 293-34-1048

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

February 12, 2000

Daniel L. Manring
Attorney at Law
PO Box 15037
Columbus, Ohio 43215-0037

Dear Mr. Manring:

Re: Linda L. Hollins vs. Commissioner of SSA
U.S.D.C. for the Southern District of Ohio,
Eastern Division
Civil Action Number C2-97-352

We have considered the reasons you disagree with the Administrative Law Judge's decision and all the issues presented in this case. We have concluded that there is no basis under the regulations for the Appeals Council to assume jurisdiction.

Explanation of Our Conclusion

The Appeals Council has considered your contentions regarding the Administrative Law Judge's decision dated November 10, 1999. You cited the *Dennard* and *Drummond* Acquiescence Rulings, arguing that the Administrative Law Judge's original finding regarding exertional limitations, rescinded in his later decision made after remand by the Federal court, constituted a "final determination" and was *res judicata*. It is well established that a decision or determination of the Commissioner is not final and binding when an interested party has timely requested review of that decision, as has occurred at each stage of the present claim (see, for example, 20 CFR 404.955, and decision, page 10, last paragraph). Accordingly, Acquiescence Rulings 98-3(6) and 984(6) are not applicable.

You also contend that all issues other than the claimant's level of literacy and possible equivalence to section 12.05C of Appendix 1, Subpart P, have been decided because the court remand was not appealed (letter brief of November 23, 1999, page 2, first and second paragraphs); the Appeals Council does not agree. While the Magistrate's Report and Recommendation discussed portions of the evidence, the decision, the arguments, and case law, only two conclusions were set out regarding the need to evaluate the possibility that the claimant equalled section 12.05C, and whether there is additional evidence in the record which addresses her claim of illiteracy. The court's remand made no findings of fact nor did it adopt any from the Administrative Law Judge's decision. As noted in the Appeals Council's Remand Order of March 12, 1999, the Administrative Law Judge's prior

decisionwas vacated. The Administrative Law Judge was directed to conduct further proceedings consistent with the order of the court, providing the claimant with an opportunity for a new hearing, developing the record pursuant: to 20 CFR 404.1512-1518, and issuing a new decision.

In compliance with the court's order to obtain expert opinion regarding the need to evaluate the possibility that the claimant equalled section 12.05C, Dr. George Serednesky was contacted. Dr. Serednesky believed the evidence documented an adjustment disorder with mixed emotional features, a reading disorder, and borderline intellectual functioning. He then stated that the claimant neither met nor equalled the requirements of section 12.05C or any other listed impairment because of lack of effort during the testing, a conflict between the IQ scores and the memory scores, and subtest scatter (Exhibit 47).

For Social Security purposes, illiteracy is taken as the inability to write even a simple message or inventory list. Dr. Wilcox, who tested the claimant in December 1994, gave no indication that the test was administered orally (Exhibit 23). In fact, on the Weschler Individual Achievement Test for Reading Comprehension she was measured at the fourth month of second grade. In addition, the claimant told Dr. West that she liked to perform "word-search" puzzles (Exhibit 46, page 3). Accordingly, the claimant cannot be considered illiterate.

You also contend that the Administrative Law Judge's decision to amend his original estimate of the claimant's residual functional capacity is not substantially supported; the

Appeals Council does not agree. As he noted in both decisions, he originally limited the claimant to light work based "...primarily on claimant's age and deconditioning" (decision, page 6, third paragraph, and Exhibit 32, page 8). Social Security Ruling 96-8p specifically states that a residual functional capacity assessment may only consider functional limitations and restrictions that result from medically determinable impairments; age and body habitus are not factors in such assessments.

What This Action Means

Under Social Security Administration regulations 20 CFR 404.984(b)(2), the Administrative Law Judge's decision is the final decision of the Commissioner after remand by the court.

IF YOU DISAGREE WITH THE ADMINISTRATIVE LAW JUDGE'S DECISION

The previous court order which remanded this case to the Commissioner ended the court's review of the prior decision. If you desire judicial review of the final decision after the court remand, you must commence a new civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right

to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals CoUncil to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

/s/ _____
Barbara J. Johnson
Administrative Appeals Judge

cc:
Linda L. Hollins
315 Water St.
Cambridge, Ohio 43725

APPENDIX E

SOCIAL SECURITY ADMINISTRATION

Office of Hearings and Appeals
Fifth Third Center
110 N. Main St., Suite 800
Dayton, OH 45402
Telephone: (937) 225-7233
Date: November 10, 1999

Refer to: 293-34-1048

Linda L. Hollins
315 Water St
Cambridge, OH 43725

NOTICE OF ADMINISTRATIVE LAW JUDGE DECISION - DENIAL
PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements

explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255.

- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council will assume that you received the notice within five days after the date at the top of this notice unless you show you did not receive it within the five-day period.

- If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.

- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.

- If the Appeals Council concludes that further action is necessary, it will either return your case to an

Administrative Law Judge for further action or issue a decision.

- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.

- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.

- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Commissioner after remand.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review the decision on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

cc: Daniel Manring
P O Box 15037
Columbus, OH 43215

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Linda L. Hollins (Claimant)	Widow's Insurance Benefits (Disability)
Richard Hollins (Wage Earner)	(XREF: 290-40-0699) 293-34-1048 (Social Security Number)

PRELIMINARY STATEMENT

The claimant filed an application for widow's insurance benefits based on disability on October 25, 1994, alleging disability since March 1, 1994, due to low back and leg pain and difficulty reading. This application was denied initially and upon reconsideration. Following a hearing held on April 9, 1996, the undersigned issued a decision denying claimant's application (Exhibit 32), which was affirmed by the decision of the Appeals Council dated March 12, 1997 (Exhibit 34). In that decision I found that the claimant had the following severe impairments: borderline intellectual functioning, major depression, and recurrent back and leg pain due to probable strain or mild arthritis. I further found that none of claimant's impairments alone or in combination met or equalled in severity the requirements of any of the Listings of Impairments. I found that claimant's physical impairment limited her to light work, and that her mental impairments further limited her essentially to low stress, simple work activity involving limited contact with others. As claimant was

fifty-one years old, I found that Rule 202.10 applied to this case, and that, despite the non-exertional limitations, there were a significant number of light jobs that she could perform.

The claimant filed a complaint with the United States District Court for the Southern District of Ohio, which remanded this claim for further proceedings by order dated January 14, 1998 (Exhibits 35 and 36). The Magistrate Judge stated that the original decision did not address the equivalency issue in discussing rejecting the application of Listing 12.05C to this case. He further directed that additional evidence be taken on the issue of illiteracy. This claim was then remanded by the Appeals Council on March 12, 1999 (Exhibit 44).

During the pendency of the application filed on October 25, 1994, the claimant filed another application for widow's insurance benefits based on disability on November 19, 1998 (Exhibit 38). It does not appear that the state Bureau of Disability Determination (BDD) has taken any action on this application in view of the pendency of claimant's appeal. However, the BDD did obtain new medical evidence which is relevant to my consideration of this case, and pertinent medical records have been received into evidence.

Pursuant to that order, and after receiving additional evidence into the record, a hearing was held on July 19, 1999, in Marietta, Ohio, at which the claimant appeared and testified, accompanied by attorney Daniel Manring. Julie Morrissey, an impartial vocational expert, also appeared and testified.

The general issue before the Administrative Law Judge is whether the claimant is entitled to widow's insurance benefits

(disability) under Sections 202(e) and 223 of the Social Security Act, as amended. Section 223 defines "disability" as the inability to engage in any substantial gainful activity by reason of any medically-determinable physical or mental impairment which can be expected to result in death or last for a continuous period of at least twelve months.

The specific issues are whether the claimant has attained age 50, whether she is the widow of the wage earner, whether she is unmarried, and whether she is under a "disability" as defined in the Act; and if so, when such "disability" commenced and the duration thereof.

Pursuant to the Act, the Commissioner has established Social Security Administration Regulations No. 4. The Regulations provide steps for evaluating disability (20 CFR 404.1520). In addition, a claimant's impairment must meet the twelve month duration requirement to be found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that the claimant is or is not disabled at any point in the review, further review is not necessary.

Disability is determined as follows under the sequential evaluation process: (i) an individual who is working and engaging in substantial gainful activity will be found "not disabled" regardless of medical findings; (2) an individual who does not have a "severe impairment" will be found "not disabled"; (3) if an individual is not working and is suffering from a severe impairment that meets the duration requirement and "meets or equals" the severity of an impairment listed in Appendix 1 of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors; (4) if an individual is capable of performing her past

relevant work, a finding of "not disabled" must be made; and (5) if an individual's impairment is so severe as to preclude the performance of past relevant work, other factors including age, education, past work experience and residual functional capacity must be considered, in accordance with the medical-vocational rules of Appendix 2 of Subpart P of Regulations No. 4, to determine if other work can be performed.

In addition, Section 20 CFR 404.336 provides, in effect, that the disability must have started not later than seven years after the insured died or seven years after the claimant was last entitled to survivor's benefits, whichever is later.

The claimant alleges disability since March 1, 1994. There is no evidence that she performed substantial gainful activity since that date. She was born on November 3, 1944, and just became fifty-five years of age. She is the unmarried widow of the wage earner, Richard Hollins, who died fully-insured on August 1, 1992 (Exhibits 1 and 4). Accordingly, the prescribed period during which the claimant must prove she became disabled ends August of 1999 (Exhibit 4). This fact is important, becomes claimant was age fifty-four as of the end of her prescribed period, and thus, for the purpose of this decision, the Vocational Rules applicable to persons age fifty to fifty-four apply.

SUMMARY OF TESTIMONY

The claimant's testimony from the first hearing held on April 9, 1996, is summarized in the prior Administrative Law Judge decision, dated May 3, 1996, and will not be repeated herein (see Exhibit 32). At the hearing held on July 19, 1999, the claimant testified that she continues to experience back and

foot pain, as well as depression. Her back pain is located in the right-center portion of her low back and is constant, but the intensity varies. The pain is aggravated by bending and can also radiate into both of her legs. She takes only over-the-counter pain medication, but these do not help. She also said she has pain in the nerves in her feet. She has received injections to decrease her pain, but these did not help. Her only treating source is Dr. Merrill.

Claimant testified that she finished the seventh grade, and was uncertain about the eighth grade. She said she was in regular classes while in school, but did repeat both the first and third grades. She said she could read very little. She has never held a job.

Claimant further testified that she suffers from depression. When she gets depressed, she cries. She cries about every day and has also thought about suicide, but has never attempted to harm herself. Dr. Merrill prescribed Paxil for her depression, which helps at times, but she does not take them as prescribed because of a lack of money. While she is supposed to take Paxil every day, she averages taking Paxil only three times per week. She has never received any treatment from a mental health specialist.

Claimant further testified that she was only able to walk one block, stand or sit for thirty minutes, and lift a five pound bag of sugar at a time. The claimant also stated that she currently cooks occasionally and goes shopping perhaps three time per month, but this is because she now lives with her son and daughter-in-law in a trailer and they do the majority of the housework. Prior to this move, she was able to dust, cook, and perform other household chores. She spends a typical day

either watching television or sitting in the back yard. She performs no yard or garden work.

SUMMARY OF MEDICAL RECORD

The recitation of evidence contained in the previous decision is incorporated herein by reference and shall not be repeated at this time. Evidence received since the previous decision documents that the claimant underwent a psychological evaluation by Susan West, Ph.D., on January 28, 1999 (Exhibit 46). WAIS-III testing resulted in a Verbal IQ score of 68, a Performance IQ score of 79, and a Full Scale IQ score of 71. However, Dr. West reported that these scores were invalid due to low effort, interest, and motivation on the claimant's part. She concluded that claimant's true cognitive abilities were in the high borderline to low average range. Wechsler Memory testing demonstrated a higher average memory score than her IQ testing would have predicted (89), and showed no memory deficits. Reading ability testing demonstrated that the claimant reads at below the second-grade level. Dr. West tested claimant's reading ability, and found a significant discrepancy between her ability and achievement. She tested at the K-8 level for basic reading and at the 1.6 grade level for reading comprehension.

Dr. West diagnosed an adjustment disorder with mixed emotional features, undifferentiated somatoform disorder, reading disorder, and a personality disorder NOS with dependent features. The claimant's speech was of normal volume and rate, was goal oriented without fragmentation of thought or flight of ideas, and was relevant and coherent. Her affect was appropriate and her mood appeared euthymic with underlying features of depression. She did not demonstrate

any unusual content in her thinking, she denied hallucinations, and there was no evidence of a formal thought disorder. She was alert, responsive, oriented to time, place, person, and situation, and did not exhibit confusion.

Dr. West summarized her opinion as follows:

> There was no indication of a formal thought disorder, hallucinations, or delusional thinking. The claimant stated that she was depressed, but denied current suicidal ideation, appearing to be preoccupied with somatic and emotional issues. Her FSIQ was in the borderline range, and she did not appear to have any memory deficits. She did appear to have a reading disorder. Based on the findings obtained within this assessment, it appears that the claimant would be able to relate appropriately with fellow workers and supervisors. The findings indicate that the claimant would be able to understand, follow and remember simple verbal instructions and directions. She would be able to maintain adequate attention and concentration in order to perform simple repetitive tasks, as well as to maintain adequate persistence and pace, if she chose to do so. The findings indicate that the claimant would have minimal impairment in being able to deal with day to day work activity, given her current cognitive and psychological functioning.

In order to obtain medical expert opinion concerning the question of whether the claimant's impairments equalled the severity described in Section 12.05C of Appendix 1 (the Listings), pursuant to the District Court remand order, interrogatories were submitted to George Serednesky, Ph.D. (Exhibit 47).[1] Dr. Serednesky reported that the evidence documented mental impairments consisting of an adjustment disorder with mixed emotional features, a reading disorder, and borderline intellectual functioning. He then stated that the claimant did not meet or equal the requirements of Listing 12.05C or any other Listing provision because the subtest scatter between both IQ testing contained in the record (Exhibits 23 and 46) demonstrated malingering, the IQ scores conflicted with memory testing, and the claimant put forth no effort during the testing. Finally, he stated that the record contained no data that would suggest medical equivalence to any Listing.

The only other medical evidence received since the remand order consists of an office note and a basic medical examination form completed by Charles Merrill, D.O. (Exhibit 45). The office note dated November 4, 1998, and documents complaints of incontinence and possible vaginal bleeding. The examination, however, was essentially within

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[1] These interrogatories were not proffered to claimant's counsel prior to submission to Dr. Serednesky as required by Hallex. However, claimant's counsel was offered the opportunity to submit additional interrogatories of his own, as well as object to any already sent, but he chose not to do so, and has thus waived his rights under Hallex. Counsel has in effect indicated that he wishes to litigate this case on the basis that Vocational Rule 202.09 applies.

normal limits and Dr. Merrill diagnosed urge incontinence, urinary tract infection, anxiety, and depression. The basic medical examination, dated November 20, 1998, notes that the claimant's medical conditions consisted of lumbar pain, depression, and anxiety. Dr. Merrill reported that the claimant was not limited in her ability to sit, but could lift eleven to twenty pounds both occasionally and frequently. He said she could stand/walk no more than three to four hours during an eight-hour work day, but he also said she could stand/walk four to five hours without interruption, a clearly inconsistent and illogical conclusion. He further stated that the claimant was moderately limited in her ability to bend, but was not significantly limited in other functional areas.

As discussed in the original opinion, the evidence of musculoskeletal impairment was very limited. X-rays taken in January 1995 were essentially normal (Exhibit 26, page 9). A physical examination in October 1994 revealed lumbosacral sprain with possible degenerative disc disease (Exhibit 24). The examining physician reported no definite sensory changes in the lumbosacral area, but noted some voluntary muscle guarding and a limited reflex on the knee and ankle. He said that muscle strength was limited involving the hamstring muscles, that the claimant could walk on heels and toes with difficulty, and she could not rise from a squat. Ranges of motion of the cervical and lumbosacral spines were limited to 35 to 40% of normal. The BDD found that claimant did not have a severe physical impairment (Exhibits 9, 14). However, in my May 3, 1996 decision, I found that claimant was limited to light work. I explained that I based the physical limitations "primarily on claimant's age and deconditioning" (Exhibit 32, page 8).

The Administration has subsequently stated that functional restrictions may only be based on medical conditions, and not on factors like age and deconditioning (SSR 96-7p, 96-8p). SSR 96-8p in particular states that the residual functional capacity assessment considers only functional limitations and restrictions that result from an individual's medically determinable impairment or combination of impairments, including the impact of any related symptoms. Age and body habitus are not factors in assessing the residual functional capacity. It is incorrect to find, as I initially did, that an individual can have limitations for disability determination purposes beyond those caused by his or her medically determinable impairments and their related symptoms; in particular, it is erroneous to consider limitations caused by age or natural body build (SSR 96-8p).

Because the original finding with respect to claimant's physical limitations was based on impermissible considerations, and of the very limited positive objective findings of musculoskeletal impairment and very limited treatment history, I decided that a formal physical medicine or orthopedic evaluation was necessary to determine whether or not claimant had a physical medical impairment, and, if so, the degree of any resulting limitations on her work ability. Such an evaluation was scheduled post hearing, but claimant did not show up for a scheduled appointment on September 8, 1999 (Exhibit 56). She did so on advice of her counsel as discussed more fully below.

DETERMINATION OF WHAT CONSTITUTES A SEVERE IMPAIRMENT

In determining whether a claimant has a severe impairment, and in determining a claimant's residual functional capacity to work, a claimant's statements about the intensity and persistence of symptoms, such as pain and depression, will not be rejected solely because the available objective medical evidence does not substantiate the statements. Because symptoms, such as pain, are subjective and difficult to quantify, any medically determinable impairment resulting in symptom-related functional limitations and restrictions which the claimant, the treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account. Factors relevant to assessing pain or other symptoms include:

(i) Daily activities;
(ii) The location, duration, frequency, and intensity of the pain or other symptoms;
(iii) Precipitating and aggravating factors;
(iv) The type, dosage, effectiveness, and side effects of any medication taken to alleviate pain or other symptoms;
(v) Treatment, other than medication received for relief of pain or other symptoms;
(vi) Any measures used to relieve the pain or other symptoms; and
(vii) Other factors concerning the functional limitations and restrictions due to pain or other symptoms.

Symptoms, including pain and depression, will be determined to diminish the claimant's capacity for basic work activities to the extent that the alleged functional limitations and restrictions due to symptoms, can reasonably be accepted as consistent with the objective medical evidence and other evidence (20 CFR 404.1529 and SSR 96-7p) .

However, a claimant still has the burden of proving disability with objective evidence (20 CFR 404.1512). An impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not simply by a claimant's statement of symptoms (20 CFR 416.908; SSR 96-7p). Before a symptom may be considered in determining a particular claimant's functional capacity to work, it must be established that such a symptom is the result of a specific medical condition (SSR 96-7p and 96-8p) .

The record establishes that the claimant suffers from the following severe impairments: borderline intellectual functioning, a reading disorder, an adjustment disorder with depressed mood, and a personality disorder NOS. A review of the updated record convinces me that it does not, and never has, established the existence of a severe physical impairment within the meaning of the Social Security Act and Regulations.

The claimant's allegations with respect to her back problems cannot be considered credible, particularly to the extent that they purport to establish disability within the meaning of the Social Security Act. While she alleged significant physical impairments, the objective medical evidence documents that, at most, she suffered a minor strain of her back at one time. Such an impairment can hardly be considered to be a

permanent, let alone disabling, impairment. The opinion of Dr. Merrill, that she is limited to performing light level work, is not supported by objective medical evidence and is based solely on the claimant's subjective allegations. Further, the claimant, while testifying to significant physical restrictions, reported to Dr. West that she was able to perform necessary housework, food preparation, and personal care tasks. She also reported that she was able to go shopping, that she walked in order to visit her mother and a friend, and that she enjoyed watching television, performing word search puzzles, and going fishing. These activities are hardly consistent with the claimant's allegations of significant physical limitation.

In my prior decision, I limited the claimant to a reduced range of light work based primarily on the claimant's age and lack of physical conditioning. However, this finding was erroneous as it was not based on sufficient objective medical evidence, and instead took into consideration factors that the Administration has subsequently stated to be irrelevant to determinations at step two of the sequential evaluation process, as discussed above (SSR 96-7p and 96-8p).

Further, although the claimant was scheduled to undergo a consultative examination in order to determine whether she did suffer from a severe physical impairment, and if so, what limitations such impairment would impose on her functional ability, she refused to attend the examination on advice of counsel (see Exhibits 51, 53, 55, and 56). Pursuant to 20 CFR 404.1518, failure to attend a consultative examination permits an adverse inference to be made concerning the claimant's disability status. I make such an inference. The reconsideration determination issued on June 27, 1995, states that the evidence documented no severe nerve or muscle

damage which might cause significant weakness or limited movement (Exhibit 14). This evaluation is consistent with the evidence of record as a whole and is adopted. The evidence of record documents no bony changes, muscle atrophy or weakness, or reflex or sensory changes. Accordingly, as there is no objective evidence of a significant physical impairment, and claimant has refused to cooperate in an assessment of her physical condition, a "severe" physical impairment cannot be found consistent with the Regulations.

Claimant's counsel advised claimant not to attend the scheduled September 1999 physical evaluation because he contends that I am bound by my prior decision to find that the claimant is limited to a restricted range of light work. However, this argument is incorrect. 20 CFR 404.983 provides that upon remand from federal court, any issues related to claimant's application may be considered by the Administrative Law Judge, whether or not they were raised before. The federal court order set aside my original determination dated May 3, 1996. There has been no final determination made in this case, and there will be none until this determination is either affirmed by reviewing authorities or becomes final by virtue of a failure to file an appeal within the required time period.

Counsel has cited a district opinion from another Circuit for the proposition that an Administrative Law Judge is limited to the issues raised in a remand order, and that his resolution of other issues has become the "law of the case" and can not be reconsidered (Exhibit 53). The cited case is *Ozbun v. Callahan*, 968 F. Supp. 478 (S.D. Iowa 1997). It does not constitute binding precedent because it is a district court decision from another Circuit. No binding court decision or

applicable statute or regulation supports the proposition that there is any such doctrine as the "law of the case" with respect to determinations made earlier in the same proceeding. The applicable Regulatory provision in fact states otherwise. In any event, the facts of the *Ozbun* case are distinguishable from those in this case. In that case, the only issue under consideration was a closed period of disability. Upon remand, the Administrative Law Judge changed his original decision that there had been a severe physical impairment during the closed period without explanation, and without doing what he had been directed to do by the federal court, which was to obtain vocational testimony on jobs that could be done with the restrictions he had originally found applicable. The evidence in that case was quite clear that claimant did have a severe physical impairment. He had a partial amputation of three fingers of his dominant hand, and was status post right lateral retinacula release of the right knee. In this case, the evidence is not clear that claimant has any specific physical impairment; the earlier determination that there was a severe physical impairment was made in large part on impermissible grounds; and, rather than arbitrarily finding that claimant does not have a severe physical impairment, I have attempted to fairly investigate such a possibility, as well as the degree of limitation caused by any such impairment, by requesting a formal physical evaluation.

I should also point out that even if my May 3, 1996 findings with respect to claimant's physical condition did become the "law" of this case, they only would be the "law" of this case through that date. Medical conditions change over time, and medical improvement, as well as deterioration, are common. Similarly, a claimant's ability to cope with limitations caused by his or her medical condition also changes over time, even

if the nature of the underlying condition itself does not change. Counsel seems to argue that there is no such thing as medical improvement or changes in a person's ability to cope with his or her medical conditions.

Claimant's counsel has also cited the case of *Drummond v. Commissioner*, 126 F.3d 837 (6th Cir. 1997). In that case, the Sixth Circuit Court of Appeals held that the doctrine of res judicata applies against the Commissioner with respect to a prior determination of claimant's residual functional capacity, unless the Commissioner is able to demonstrate that there has been medical improvement since the date of the prior determination. The *Drummond* case is distinguishable from the present case in several respects. First, there has been no prior determination in this case, so there is no determination that would be the "res judicata." The original determination was vacated by the federal district court when it remanded the case. Second, claimant is in effect trying to prevent the Commissioner from determining if there has been medical improvement, which the *Drummond* decision permits, by refusing to participate in a consultative examination. Third, the doctrine of res judicata or collateral estoppel should not be used as a basis for perpetuating a finding that is based on factors that are impermissible under the Regulations, like a claimant's age and deconditioning, or otherwise creating or perpetuating an injustice. As long as a determination is not final, the Commissioner should be free to correct any mistakes in law, as well as in fact, made earlier in the proceedings by his representatives.[2]

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[2] In this regard, the Administration should carefully consider whether it is wise to require Administrative Law Judges to make precise residual functional capacity assessments in their

APPLICATION OF THE LISTING OF IMPAIRMENTS

The claimant's impairments do not meet the severity of any of those impairments described in Appendix 1, Subpart P, Regulations No. 4. Nor do the claimant's impairments equal in severity the requirements of any Listing. It should first be pointed out that an Administrative Law Judge is not permitted to make a finding of medical equivalence under the Regulations unless there is a qualified medical expert opinion to that effect. See 20 CFR 404.1526(b). There is no such opinion in this case.

BDD reviewing psychologists specifically considered whether the claimant's impairments equalled the severity of any Listing, and they concluded that they did not (Exhibits 8, 13, and 27). Further, Dr. Serednesky specifically considered whether the claimant's impairment equalled the severity of Section 12.05C of Appendix 1, which was done pursuant to the federal court remand order. He concluded that the evidence of record contained no information suggesting that the claimant's impairment equalled the severity of Listing 12.05C. Based on these four expert medical opinions, and without contradicting evidence, I must accept these opinions

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decisions. Such assessments are very subjective to begin with, whether made by judges or doctors, and it is doubtful that any ten doctors or any ten judges would come up with precisely the same limitations if presented with the same set of facts, particularly when mental impairments are involved. The only issue that need be resolved in a particular case is whether or not the claimant has been disabled during the time period in issue, and a finding of a minimal residual functional (as opposed to a maximum one) would suffice for this purpose.

and find that the claimant's impairment does not equal the requirements of any Listing.

DETERMINATION OF CLAIMANT'S RESIDUAL FUNCTIONAL CAPACITY

I find that the claimant lacks the residual functional capacity to: (1) perform other than simple, repetitive tasks (which includes no requirement to followed detailed or written instructions); (2) maintain concentration for longer than fifteen minutes at a time on a single task (while remaining free to turn her attention to other tasks thereafter); (3) perform other than low stress job activity (i.e., no jobs involving above average pressure for production); or (4) perform tasks requiring reading or writing skills.

The analysis of medical evidence contained in my prior decision, to the extent that it explained my rationale in finding functional limitations secondary to the claimant's mental impairments, is adopted and incorporated by reference. The only exception is the previous limitation to jobs involving no more than limited contact with supervisors and co-workers. Upon reconsidering the evidence then of record in conjunction with the examination report of Dr. West, I find that the need for such a restriction is not supported by the evidence now of record. While Dr. Wilcox stated that the claimant would "appear to be limited in her ability to interact in a predictable and adequate manner" with co-workers and supervisors, he also stated that she would have no difficulty getting along with others or the general public. Claimant has demonstrated no specific difficulty getting along with others, and I find Dr. West's conclusion to be persuasive. The BDD medical reviewer who reviewed Dr. Wilcox's original report also

concluded that there was no significant impairment with respect to social functioning ability (Exhibit 27) .

In addition, the evidence of record admitted into evidence since my prior decision confirms that the claimant's mental residual functional capacity is sufficient toperform sustained work activity. No mental health professional has stated that the claimant is disabled from all work activity. In fact, this residual functional capacity may even be somewhat more restrictive than necessary based on the claimant's lack of effort during her most recent psychological testing. However, giving her the benefit of the doubt, I find that she is limited to low stress, simple, repetitive tasks which do not require reading or writing skills, and which do not require sustained concentration for periods of longer than fifteen minutes on specific tasks as set forth above.

ABILITY TO PERFORM PAST RELEVANT WORK

Claimant has performed no past relevant work.

ABILITY TO PERFORM OTHER WORK

Once a claimant has established that she cannot perform her past relevant work because of her impairments, or, as here, that she has no past relevant work experience, the burden shifts to the Commissioner to show that there are other jobs in the national economy which the claimant can perform, consistent with the claimant's medically-determinable impairments, functional limitations, age, education, and work experience. The Commissioner is able to satisfy this burden of proof in this case.

At age fifty-four as of the end of her prescribed period, the claimant is considered to be "closely approaching advanced age" for the purpose of this decision (20 CFR 404.1563). The claimant has a seventh-grade or "limited" education, and is illiterate for Social Security purposes based on the information provided in the updated record (20 CFR 404.1564). The claimant lacks transferable work skills to other jobs within her residual functional capacity (20 CFR 404.1568).

If the claimant's non-exertional limitations did not significantly compromise her ability to perform work at all exertional levels, section 204.00, Appendix 2, Subpart P, Regulations No. 4 would provide that a finding of not disabled must be made. If her capacity to work at all levels were significantly compromised, the remaining work which she would functionally be capable of performing would be considered in combination with her age, education, and work experience to determine whether a work adjustment could be made.

The Vocational Expert at the hearing was therefore asked what jobs were available, if any, in the regional economy that could be performed by someone with claimant's residual functional capacity as set forth above and vocational profile. The Vocational Expert first defined the regional economy to be the southwest Ohio area, including the area surrounding Dayton and Cincinnati, Ohio. The Vocational Expert said that this region had 1.2 million jobs which were proportionately representative of jobs existing at the national level.

The Vocational Expert then said that some 7,000 jobs would be available to such an individual at the light exertional level as a packaging machine operator or small machine operator.

The Vocational Expert said that some 8,000 jobs would be available to such an individual at the medium exertional level as a hand packer or kitchen worker.

In defining jobs which a hypothetical individual with the claimant's vocational profile and residual functional capacity could do, the vocational expert did not limit her consideration to the immediate area where the claimant lives, i.e., near Marietta, Ohio. However, 20 CFR 404.1566 provides, in pertinent part, that work exists in the national economy when it exists in significant numbers *either* in the region where the individual lives or in several other regions of the country. It does not matter whether the work exists in the immediate area where the individual lives or whether a specific job vacancy exists for him or her. In this case, the vocational expert testified to a number of jobs which I find significant in terms of the Southwest Ohio economy. The vocational expert's testimony indicated that this region has a work force of about 1.2 million, which is representative of the national economy, whereas the Marietta region lacks a strong industrial or manufacturing base and is not representative of the national economy. Furthermore, the vocational expert's testimony indicated that the jobs cited exist in proportionate numbers in other regions of the nation, thereby satisfying the "significant numbers" test set forth in 20 CFR 404.1566.

It should be further noted that the hypothetical question asked the Vocational Expert contained additional restrictions which I do not find to be warranted after a review of the updated record. It contained restrictions on repetitive stooping, crouching, and kneeling, a restriction on any climbing or crawling, and a restriction on having more than limited contact with others in a work setting. For the reasons set forth

above, I find no adequate justification in the updated record to impose such restrictions.

Based on the testimony of the Vocational Expert, and using the above cited Vocational Rule as a framework for decision making, I find that there are a significant number of jobs in the national economy which claimant can perform despite her limitations. Accordingly, I find that the claimant's residual functional capacity has not been diminished to the extent that the claimant is unable to make a vocational adjustment to work that exists in significant numbers in the national economy, and that the claimant has not been under a "disability," as defined in the Social Security Act and Regulations, at any time since the alleged onset date through the date of this decision.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant was born on August 28, 1944.

2. The claimant is the widow of the wage earner, who died fully insured on August 1, 1992, and the claimant is not married.

3. The period during which the claimant must establish that she was under a disability ended on August 31, 1999.

4. The claimant has not engaged in substantial gainful activity since March 1, 1994.

5. The medical evidence establishes that the claimant has the following severe impairments: borderline intellectual functioning, a reading disorder, an adjustment disorder with depressed mood, and a personality disorder NOS. The record fails to establish the existence of any severe physical impairment.

6. The claimant does not have an impairment or combination of impairments listed in, or medically equal to one listed in, Appendix 1, Subpart P, Regulations No. 4.

7. The claimant's subjective allegations lack credibility to the extent that they purport to describe a condition of disability within the meaning of the Social Security Act and Regulations.

8. The claimant lacks the residual functional capacity to: (1) perform other than simple, repetitive tasks (a restriction which includes no requirement to follow detailed or written instructions; (2) to maintain concentration for longer than fifteen minutes at a time on any single task (while remaining free to turn her attention to other tasks thereafter); (3) to do other than low stress job duties (i.e., no job involving above average pressure for production or fixed production quotas); or (4) perform tasks requiring any reading or writing skills (20 CFR 404.1545).

9. The claimant has no past relevant work experience.

10. The claimant's residual functional capacity for the full range of work at all exertional levels is reduced by the limitations set forth in Finding No. 8.

11. The claimant was 54 years old as of the end of her prescribed period, which classifies claimant as being "closely approaching advanced age" (20 CFR 404.1563).

12. The claimant has a seventh-grade or limited education, and is illiterate (20 CFR 404.1564).

13. The claimant does not have any acquired work skills which are transferable to other jobs within her residual functional capacity (20 CFR 404.1568).

14. Based on an exertional capacity for work, and the claimant's age, education, and work experience, section 404.1569 and Rule 204.00, Appendix 2, Subpart P, Regulations No. 4, would direct a conclusion of "not disabled."

15. Although the claimant's additional non-exertional limitations do not allow claimant to perform the full range of work, using the above-cited rule as a framework for decision making, there are a significant number of jobs in the national economy which claimant could perform. Examples of such jobs at the light and medium exertional levels are: packaging machine operator, small machine operator, hand packer, and kitchen worker. Such jobs exist in the numbers of at least 15,000 in the region surrounding

Dayton, Ohio, a region that contains jobs that exist proportionately at the national level.

16. The claimant was not under a "disability," as defined in the Social Security Act, at anytime through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that the claimant is not entitled to widow's insurance benefits (disability) under sections 202(e) and 223, respectively, of the Social Security Act.

/s/ _____
James I.K. Knapp
Administrative Law Judge

November 10, 1999
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

Name: Linda L. Hollins SSN: 290-40-0699

Assessment is for: Other: March 1, 1994 to August 1999

Administrative Law Judge's Signature Date

/s/ _____ Nov.10, 1999
James Knapp

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Category(ies) Upon Which the Medical Disposition(s) is Based:

PRESENT	ABSENT		
[ ]	[x]	12.02	Organic Mental Disorders
[ ]	[x]	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	12.04	Affective Disorders
[x]	[ ]	12.05	Mental Retardation and Autism
[ ]	[x]	12.06	Anxiety Related Disorders
[ ]	[x]	12.07	Somatoform Disorders
[x]	[ ]	12.08	Personality Disorders
[ ]	[x]	12.09	Substance Addiction Disorders

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER
(Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

C. **12.04 Affective Disorders** - Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:
   - a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
   - b. [ ] Appetite disturbance with change in weight, or
   - c. [ ] Sleep disturbance, or
   - d. [ ] Psychomotor agitation or retardation, or
   - e. [ ] Decreased energy, or
   - f. [ ] Feelings of guilt or worthlessness, or
   - g. [ ] Difficulty concentrating or thinking, or
   - h. [ ] Thoughts of suicide, or

i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
   - a. [ ] Hyperactivity, or
   - b. [ ] Pressures of speech, or
   - c. [ ] Flight of ideas, or
   - d. [ ] Inflated self-esteem, or
   - e. [ ] Decreased need for sleep, or
   - f. [ ] Easy distractibility, or
   - g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
   - h. [ ] Hallucinations, delusions or paranoid thinking

3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: Adjustment Disorder

D. **12.05 Mental Retardation and Autism** - Significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22), or pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded*

2. [ ] [x] [ ] A valid verbal, performance, or full scale I.Q. of 59 or less*

3. [ ] [x] [ ] A valid verbal, performance, or full scale I.Q. of 60 to 70 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function*

4. [ ]	[x]	[ ]	A valid verbal, performance or full scale I.Q. of 60 to 70 inclusive or in the case of autism, gross deficits of social and communicative skills*
5. [x]	[ ]	[ ]	Other: Borderline Intellectual Functioning with Illiteracy

* NOTE: Items 1, 2, 3, and 4 correspond to Listings 12.05A, 12.05B, 12.05C, and 12.05D, respectively.

G. **12.08 Personality Disorders** - Inflexible and maladaptive personality traits which cause either significant impairment in social or occupational functioning or subjective distress, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ]	[x]	[ ]	Seclusiveness or autistic thinking
2. [ ]	[x]	[ ]	Pathologically inappropriate suspiciousness or hostility
3. [ ]	[x]	[ ]	Oddities of thought, perception, speech and behavior
4. [ ]	[x]	[ ]	Persistent disturbances of mood or affect
5. [ ]	[x]	[ ]	Pathological dependence, passivity, or aggressivity
6. [ ]	[x]	[ ]	Intense and unstable interpersonal relationships and

				impulsive and damaging behavior
7.	[x]	[ ]	[ ]	Other: Personality Disorder NOS

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05) EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER(S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing(s) under which the items below are being rated:
12.04, 12.05, 12.08

OHA Psychiatric Review Technique Form - 11/10/99

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

1. Restrictions of Activities of Daily Living:

None[ ] Slight[x] Moderate[ ] Marked*[ ] Extreme[ ] Insuff Evid[ ]

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[x] Moderate[ ] Marked*[ ] Extreme[ ] Insuff Evid[ ]

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[x] Frequent*[ ] Constant[ ] Insuff Evid[ ]

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never[x] Once/Twice[ ] Repeated*(3+) [ ] Continual[ ] Insuff Evid[ ]

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

APPENDIX F

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE
[Dated March 12, 1999]

In the case of	Claim for
Linda L. Hollins	Widow's Insurance Benefits
(Claimant)	
Richard Hollins	293-34-1048
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

The United States District Court for the Southern District of Ohio has remanded this case (Civil Action Number C2-97-352) to the Commissioner of Social Security for further administrative proceedings in accordance with the fourth sentence of section 205(g) of the Social Security Act. Therefore, the Appeals Council vacates the final decision of the Commissioner in this case and remands the case to an Administrative Law Judge for further proceedings consistent with the order of the court.

The file is being forwarded to:

David A. Redmond
Hearing Office Chief Administrative Law Judge
Office of Hearings and Appeals
One Citizens Federal Centre, Suite 800
ii0 N. Main Street Dayton, OH 45402

Upon its receipt, the case will be assigned to an Administrative Law Judge pursuant to the order of the Appeals Council. The Administrative Law Judge will provide the claimant an opportunity to appear at a hearing, develop the record pursuant to 20 C.F.R. §§ 404.1512-404.1518 and/or 416.912-416.918, and issue a new decision.

Notice of this action is being made by the mailing of a copy of this order to the claimant and her representative to the addresses shown below.

/s/ _____
Andrew E. Wakshul
Administrative Appeals Judge

Claimant's Name and Address:
Linda L. Hollins
315 Water Street
Cambridge, Ohio 43725

Representative's Name and Address:
Daniel L. Manring
Attorney at Law
P.O. Box 15037
Columbus, Ohio 43215-0037

DATE: March 12, 1999

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-97-352

[Filed January 14, 1998]

Linda L. Hollins,
Plaintiff

v.

Kenneth S. Apfel, Commissioner of Social Security,
Defendant.

JUDGE SMITH

ORDER

This case is before the Court to consider a Report and Recommendation issued by the Magistrate Judge on November 26, 1997. No objections have been filed to the Report and Recommendation. Therefore, the Court ADOPTS the Report and Recommendation. The parties' motions for summary judgment are DENIED. Plaintiff's alternative request for a remand is GRANTED. This action is REMANDED to the Commissioner for further proceedings

pursuant to 42 U.S.C. §405(g), sentence four. The Clerk is directed to enter a judgment to that effect.

/s/ _____
George C. Smith
United States District Judge

UNITED STATES DISTRICT COURT
Southern District of Ohio
Eastern Division

Case No. C2-97-352

[Filed January 14, 1998]

Linda L. Hollins, Plaintiff	)
v.	)
Kenneth S. Apfel, Commissioner of Social Security, Defendant.	)

Judge Smith
Magistrate Judge Kemp

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court**. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed January 14, 1998, this action is hereby REMANDED to the Commissioner for further proceedings pursuant to 42 U.S.C. §405(g), sentence four.

Date: January 14, 1998

KENNETH I. MURPHY, CLERK

/s/ _____
By /Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-97-352

[Filed November 26, 1997]

Linda L. Hollins,
Plaintiff,

v.

Kenneth S. Apfel, Commissioner of Social Security,
Defendant.

JUDGE SMITH

REPORT AND RECOMMENDATION

Plaintiff, Linda L. Hollins, filed this action seeking a review of a final decision of the Commissioner of Social Security ("Commissioner") denying her application for widow's insurance benefits based upon disability. Plaintiff's application, which was filed with an effective date of October 17, 1994, alleged. that she became disabled on March 1, 1994 due to back and leg pain as well as poor reading skills. After initial administrative denials of her claim, plaintiff was

afforded a hearing before an Administrative Law Judge on April 9, 1996. In a decision dated May 3, 1996, the Administrative Law Judge denied benefits. That decision became the final decision of the Commissioner when the Appeals Council denied review on March 12, 1997.

Plaintiff thereafter timely commenced this civil action. The record of administrative proceedings was filed in this Court on May 29, 1997. Plaintiff moved for summary judgment on June 30, 1997, and the Commissioner responded on July 29, 1997. No reply brief has been filed, and this matter is now ripe for decision.

Plaintiff, now 53 years old, has been a widow since August 1, 1992. (Tr. 136). She has a seventh grade education and has never worked outside the home. (Tr. 136-37, 145). Plaintiff testified that she has pain in her back, instability in her legs, and a burning sensation in her feet. (Tr. 137). She testified that these problems began with a hysterectomy which was performed 27 years before. (Tr. 138). She does get some pain relief from taking Advil or aspirin. (Tr. 139). Plaintiff testified that she also suffers from numbness in her hands. (Tr. 140). She has been depressed since her husband's death. *Id.* Her daily routine consists of watching television and taking naps. (Tr. 141). She also does some cooking, washes dishes, and shops occasionally. (Tr. 142-43).

Plaintiff testified that she can stand for five to ten minutes at a time, and sit for 20 minutes. (Tr. 144). It hurts her hands to lift a five pound bag of sugar. (Tr. 144-45).

There are few medical records in the file. First, Dr. Wilcox, a psychologist, interviewed plaintiff on December

14, 1994. She reported feeling depressed since her husband's death, and stated that she lacked energy and interest in carrying out daily activities. She had a full-scale IQ of 72, and a verbal IQ of 71. Dr. Wilcox believed that plaintiff's reading comprehension was impaired. He concluded that she suffered from major depression, recurrent, of mild severity, as well as a dependent personality disorder and borderline intellectual functioning. He noted that she was able to stay on task during the testing administered. He believed she could understand and carry out simple verbal job instructions, that she had the limited ability to interact with supervisors and co-workers, and that she could maintain attention in order to perform simple, repetitive tasks. (Tr. 86-89).

Plaintiff was seen by Dr. Magness on October 19, 1994 complaining of pain in her lumbosacral area. Physical examination revealed a limited range of motion in her back but no definite sensory changes. Dr. Magness diagnosed lumbosacral sprain. He believed that plaintiff could sit and stand on a limited basis, was also limited in her ability to walk and bend, and probably could not lift more than ten pounds. (Tr. 91-92).

Various treatment notes from other doctors were also submitted. They indicate, among other things, that plaintiff suffered from bilateral neuromas on her feet, some of which were improved by injection, and that she had diagnoses of depression, anxiety, and arthritis. (Tr. 93-101). Her lumbar spine was X-rayed on January 10, 1995, and it was normal. (Tr. 102).

In addition to plaintiff, a vocational expert, Ms. Ewers, testified at the administrative hearing. She was asked

to assume that plaintiff had the ability to perform the exertional requirements of light or sedentary work, but could not have a job which required reading or writing, that she could maintain only limited interpersonal contact with supervisors and co-workers, that she could do a job that involved simple, repetitive tasks, without the need to concentrate on a single task for more than fifteen minutes, and the job had to be performed in a low stress environment. Based upon this hypothetical question, the vocational expert identified in excess-33,000 jobs which could be performed by someone with those limitations. (Tr. 149-50). If plaintiff's ability to walk was significantly limited, if she required a sit/stand option, and if her ability to lift was limited to five pounds, she could still perform 1500 jobs at the light exertional level and 3800 jobs at the sedentary level. (Tr. 150-51). However, if plaintiff was unable to complete any tasks, she would not be employable. (Tr. 153).

Based upon this evidence, the Commissioner concluded that plaintiff suffered from severe impairments best described as borderline intellectual functioning, major depression, and recurrent back and leg pain due to probable strain or mild arthritis. The Commissioner further concluded that plaintiff lacked the residual functional capacity to work at jobs above the light exertional level, to perform jobs requiring reading and writing skills, to have more than limited contact with supervisors and co-workers, to concentrate on a single task more than 15 minutes at a time, to perform anything other than simple, repetitive tasks, and to work in other than a low stress environment. Plaintiff was further found to have a "limited" education and no relevant work experience or transferable work skills. Given the fact that the plaintiff could perform only a reduced range of light work, the medical-

vocational guidelines were not strictly applicable, but based upon the testimony of the vocational expert, plaintiff was found to have the ability to perform 33,800 jobs in the regional economy. Given that finding, she was denied disability benefits.

In her motion for summary judgment, plaintiff raises essentially two claims. First, she contends that the combination of her low IQ test score and her other-impairments is the equivalent of the disability finding described in Listing 12.05(C). Second, she contends that the Commissioner erred in determining that she had a limited education, and should have found that she was illiterate, a finding which would mandate a conclusion of disability pursuant to the Medical-Vocational Guidelines. The question presented is whether the Commissioner's findings are supported by substantial evidence.

Standard of Review. Under the provisions of 42 U.S.C. Section 405(g), "[t]he findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . ." Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (*quoting Consolidated Edison Company v. NLRB*, 305 U.S 197, 229 (1938)). It is "'more than a mere scintilla.'" *Id. LeMaster v. Weinberger*, 533 F.2d 337, 339 (6th Cir. 1976). The Secretary's findings of fact must be based upon the record as a whole. *Harris v. Heckler*, 756 F.2d 431, 435 (6th Cir. 1985) ; *Houston v. Secretary*, 736 F.2d 365, 366 (6th Cir. 1984) ; *Fraley v. Secretary*, 733 F.2d 437, 439-440 (6th Cir. 1984). In determining whether the Secretary's decision is supported by substantial evidence, the

Court must "'take into account whatever in the record fairly detracts from its weight.'" *Beavers v. Secretary of Health, Education and Welfare*, 577 F.2d 383, 387 (6th Cir. 1978) (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)); *Wages v. Secretary of Health and Human Services*, 755 F.2d 495, 497 (6th Cir. 1985). Even if this Court would reach contrary conclusions of fact, the Secretary's decision must be affirmed so long as his determination is supported by substantial evidence. *Kinsella v. Schweiker*, 708 F 2d 1058, 1059 (6th Cir. 1983).

The Court turns first to plaintiff's contention that her impairments should be considered the equivalent of the impairment described in Listing 12.05(C). That Listing creates a presumption of disability for someone who has a verbal, performance, or full scale IQ of between 60 and 70 and a physical or other mental impairment which imposes significant work-related limitation or function. Plaintiff concedes that none of her IQ scores were 70 or below, but she contends that the fact that they were all only slightly over 70 (her verbal IQ is 71 and her full-scale IQ is 72), combined with other factors present in the file, suggest either that a finding of equivalency should have been made, or that the matter should be remanded for expert opinion on that subject.

The Court of Appeals, albeit in an unpublished opinion, recently considered an almost identical claim. In *Nash v. Secretary of HHS*, Case No. 94-5376 (6th Cir., June 15, 1995), 1995 WL 363381 (*per curiam*), the Court was presented with a claimant who had, as her lowest IQ score, a 71 in the verbal test. She also had other severe physical limitations, including a foot spur and asthma. Although the claimant conceded that she did not exactly meet the terms of

12.05(C), she argued that the equivalency issue was not adequately addressed in the Commissioner's decision, and that a combination of significant physical impairments and an IQ test score of 71 could have been determined to have been the equivalent of Listing 1.05(C). Despite the fact that there was a cursory recitation in the Administrative Law Judge's opinion to the effect that plaintiff's condition did not equal or meet any listed impairment, the fact that there was no specific discussion of it prompted the Court to state that "[r]ather than speculate as to whether A.L.J. conducted the proper analysis . . . we think it better for the Secretary to revisit the issue," and the case was returned to the District Court with instructions to remand it to the Secretary for further proceedings, including specifically addressing the equivalency issue.

The facts of this case are almost identical. One of plaintiff's three IQ scores, her verbal IQ, was 71. Her full scale IQ was only 72. These scores are one and two points above the cutoff level for Listing 1.05(C). The Commissioner also found that plaintiff had severe physical impairments, including recurrent back and leg pain, which limited her to work at the light level, and that she also had another psychological impairment, major depression. These would appear similar to or even more severe than, the other impairments from which the plaintiff in *Nash* suffered. Additionally, the narrative decision by the ALJ does not discuss the equivalency issue at all, and there is no expert testimony in the file which addresses it. Under all of these circumstances, and consistent with the reasoning in *Nash*, the Court believes that a remand for further consideration of this issue would be useful.

Although a remand on this issue essentially moots plaintiff's second claim, the Court believes that some brief discussion of it is also appropriate. Plaintiff contends that she should be deemed to be illiterate because her reading comprehension was at the second to third grade level. She also testified at the administrative hearing to difficulty with reading even simple items. On the other hand, the Commissioner argues that there was sufficient evidence to show that she could read social security notices and take appropriate action. The record is unclear as to whether the IQ tests which were administered by Dr. Wilcox were administered verbally or in writing. If the latter is the case, it would significantly undercut plaintiff's claim that she is illiterate, as opposed to having simply a "marginal" or "limited" education. On remand, the Commissioner should consider whether there is additional evidence in the existing record which addresses her claim of illiteracy, or whether some additional evaluation of that claim is necessary.

Based upon the foregoing, it is recommended that both parties' motions for summary judgment be denied, that plaintiff's alternative request for a remand be granted, and that this case be remanded to the Commissioner for further proceedings pursuant to 42 U.S.C. §405(g), sentence four. It is further recommended that the Clerk enter a judgment to that effect.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or

recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate Judge with instructions. 28 U.S.C. §636(b) (1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ _____
United States Magistrate

APPENDIX I

SOCIAL SECURITY ADMINISTRATION
Refer to: TAHBG
293-34-1048

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

[Dated March 12, 1997]

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Linda L. Hollins
315 Water Street
Cambridge, OH 43725

Dear Ms. Hollins:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on May 3, 1996.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general

public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in your representative's letter dated May 29, 1996, but concluded that the contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The fight

to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
John S. Lamb
Appeals Officer

cc:
Daniel L. Manring, Esq.

APPENDIX J

SOCIAL SECURITY ADMINISTRATION

Office of Hearings and Appeals
One Citizens Federal Centre
110 N. Main St., Suite 800
Dayton, OH 45402
Telephone: (937) 225-7233
Date: May 3, 1996

Refer to: 293-34-1048

Linda L. Hollins
315 Water St
Cambridge, OH 43725

NOTICE OF DECISION - UNFAVORABLE

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request that the Appeals Council review the decision. You must make the request in writing. You may use

our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review **within 60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had good cause for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide when and how to review a case.

These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council may review your case for any reason. It will review your case if one of the reasons for review listed in our regulations exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council May Review The Decision On Its Own

The Appeals Council can review my decision even without your request to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose Some benefits, or not qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (614) 439-4422. Its address is 1225 Woodlawn Avenue, Cambridge, OH. 43725.

James I.K. Knapp
Administrative Law Judge

Enclosures

cc:

Manring & Farrell
P.O. Box 15037
Columbus, OH 43211

SOCIAL SECURITY ADMINISTRATION
Officeof Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
	Widow's Insurance
Linda L. Hollins	Benefits (Disability)
(Claimant)	
	(XREF: 290-40-0699)
Richard Hollins	293-34-1048
(Wage Earner)	(Social Security Number)

The claimant filed an application for widow's insurance benefits based on disability with a protected filing date of October 17, 1994, alleging disability since March 1, 1994, due to low back and leg pain and poor reading skills. This application was denied initially and upon reconsideration. It is currently before me on a timely Request for Hearing. A hearing was held on April 9, 1996, in Marietta, Ohio, at which the claimant appeared and testified. She was represented by her attorney, Daniel Manring.

The general issue is whether the claimant is entitled to widow's insurance benefits (disability) under Sections 202(e) and 223 of the Social Security Act, as amended. Section 223 defines "disability" as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or that has lasted for a continuous period of at least 12 months.

Prior to enactment of Public Law 101-508 on November 5, 1990, Section 223 of the Act provided that a widow could not be determined to be under a disability unless her physical or mental impairment was of a level of severity which under regulations prescribed by the Secretary (now Commissioner) was deemed to be sufficient to preclude an individual from engaging in any gainful activity. As amended by Public Law 101-508, Section 223 permits a widow to be found disabled if her physical or mental impairment or impairments are of such severity as to prevent the widow from engaging in her previous work and, considering her age, education, and work experience, any other kind of substantial gainful work that exists in the national economy. The amended definition of disability is effective for entitlement to monthly benefits beginning January 1991 or later for which applications are filed or pending on January 1, 1991, or later.

The specific issues are whether the claimant has attained age 50, whether she is the widow of the wage earner, whether she is unmarried, and whether she is under a "disability" as defined in the Act; and if so, when such "disability" commenced and the duration thereof.

Pursuant to the Act, the Secretary (now Commissioner) has established Social Security Administration Regulations No. 4. The regulations provide steps for evaluating disability (20CFR 404.1520). In addition, a claimant's impairment must meet the 12 month duration requirement to be found disabling, A set order is followed to determine whether an individual isdisabled. If it is determined that the claimant is or is not disabled at any point in the review, further review is not necessary.

Disability is determined as follows under the sequential evaluation process: (1) an individual who is working and engaging in substantial gainful activity will be found "not disabled" regardless of medical findings; (2) an individual who does not have a "severe impairment" will be found "not disabled"; (3) if an individual is not working and is suffering from a severe impairment that meets the duration requirement and "meets or equals" the severity of an impairment listed in Appendix 1 of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors; (4) if an individual is capable of performing her past relevant work, a finding of "not disabled" must be made; and (5) if an individual's impairment is so severe as to preclude the performance of past relevant work, other factors including age, education, past work experience and residual functional capacity must be considered, in accordance with the medical-vocational rules of Appendix 2 of Subpart P of Regulations No. 4, to determine if other work can be performed.

In addition, Section 20 CFR 404.336 provides, in effect, that the disability must have started not later than seven years after the insured died or seven years after the claimant was last entitled to survivor' s benefits, whichever is later. The claimant' s prescribed period therefore extends through July 31, 1999.

The claimant was born on August 28, 1944. She attained age 50 on August 27, 1994 (20 CFR 404.2(c)(4)). The claimant is the widow of the deceased wage earner, Richard Hollins, who died fully insured for Social Security purposes on August 1, 1992. The claimant has not remarried.

The claimant alleges disability from March 1, 1994, though the earliest she could be eligible for widow's benefits would be August 1994, when she became age 50. There is no evidence that the claimant has performed substantial gainful activity since her alleged onset date.

The claimant testified that she has low back painwith radiation into the legs. She said that she sometimes has to use a cane to walk. She reported burning and pain in the legs bilaterally. The claimant said that she has had shots for pain in the feet which helped some. She said that she takes aspirin and other over-the-counter medication for pain. The claimant stated that her hands get numb and her fingers ache but that the condition has not been diagnosed, and she does not get any treatment for the condition. The claimant said that she completed the seventh grade and that she can read only a very little. She stated that she is depressed with symptoms of daily crying spells, suicidal ideation, loss of interest in activities and feelings of isolation. She reported that she took medication for depression but that it did not really help. She stated that she has not undergone treatment or therapy with a mental health specialist.

A physical examination in October 1994 revealed lumbosacral sprain with possible degenerative disc disease (Exhibit 24). Dr. Alfred Magness, who examined the claimant at that time, reported no definite sensory changes in the lumbosacral area, but noted some voluntary muscle guarding and a limited reflex on the knee and ankle. He indicated that muscle strength was limited involving the hamstring muscles, that the claimant could walk on heels and toes with difficulty, and she could not rise from a squat. Dr. Magness reported that range of motion of thecervical and lumbosacral spines was limited to 35-40%

of normal. He reported no evidence of atrophy but said the claimant reported radiculopathy in both legs.

Claimant was diagnosed with neuromas between the third and fourth toes bilaterally in December 1994 by Dr. Kenneth Wiencek. Claimant received immediate relief from a steroid injection and Lidocaine (Exhibit 25). He stated that x-rays showed no bony changes and he reported good range of motion at the joints.

X-rays in January 1995 revealed the lumbar spine to be essentially within normal limits and no bony abnormalities were noted involving the sacrum or coccyx either (Exhibit 26 at 9).

In November 1994 the claimant began complaining to her treating family doctor, Dr. Shashi Vora, that she had anxious feelings (Exhibit 26 at 4). Dr. Vora prescribed medication for anxiety.

The medical record reflects diagnoses by Roger Wilcox, Ph.D., after a psychological evaluation in December 1994, of mild recurrent major depression, a dependent personality disorder, borderline intellectual functioning (verbal I.Q. 71, performance I.Q. 75, and full-scale I.Q. 72), borderline memory deficit, and impaired reading comprehension (2.4 grade equivalent) (Exhibit 23). Dr. Wilcox assessed the claimant as able to perform simple, repetitive tasks, as possibly limited in her ability to interact predictably and adequately with supervisors and co-workers, but as able to deal with the general public, as exhibiting a fair degree of effort and pace, as able to understand the instructions presented and as giving no evidence of any undue fatigue, but

as having poor concentration. In addition, reading comprehension was reported to be at the 2.4 grade equivalent.

A claimant's statements about the intensity and persistence of symptoms, such as pain or depression, will not be rejected solely because the available objective medical evidence does not substantiate the statements. Because symptoms, such as pain, are subjective and difficult to quantify, any medically determinable impairment resulting in symptom-related functional limitations and restrictions which the claimant, the treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account. Factors relevant to assessing pain or other symptoms include:

(i) Daily activities;
(ii) The location, duration, frequency, and intensity of the pain or other symptoms;
(iii) Precipitating and aggravating factors;
(iv) The type, dosage, effectiveness, and side effects of any medication taken to alleviate pain or other symptoms;
(v) Treatment, other than medication received for relief of pain or other symptoms;
(vi) Any measures used to relieve the pain or other symptoms; and
(vii) Other factors concerning the functional limitations and restrictions due to pain or other symptoms.

Symptoms, including pain, will be determined to diminish the claimant's capacity for basic work activities to the extent that

the alleged functional limitations and restrictions due to symptoms, can reasonably be accepted as.consistent with the objective medlcal evidence and other evldence (20 CFR 404.1529 and SSR 95-5p).

The medical evidence establishes that the claimant has borderline intellectual functioning, major depression, and recurrent back and leg pain due to probable strain or mild arthritis. Since these impairments affect her ability to perform work-related functions, they constitute "severe" impairments within the meaning of the Social Security Act. However, theseverity of these impairments does not meet or equal the degree of severity described in Appendix 1, Subpart P, Regulations No. 4.

Due to the severe impairments, I find that the claimant lacks the residual functional capacity to: (1) do greater than light exertional work activity; (2) perform jobs requiring reading and writing skills; (3) have more than limited contact with supervisors and co-workers; (4)concentrate on a single task last longer than 15 minutes at a time (but the claimant is free to turn her attention to other matters thereafter); (5) perform other than simple, repetitive tasks or tasks requiring her to follow complex or detailed instructions; or (6) work in other than a low stress environment.

I base the above physical limitations primarily on claimant's age and deconditioning. There are few objective findings of ongoing significant physical impairment in the record. Dr. Magness, who saw the claimant one time in October 1994, said she was having difficulty walking (Exhibit 24). About two months later the claimant was given pain injections by Dr. Wiencek for neuromas between the third and fourth toes

bilaterally. The claimant told Dr. Wiencek that she had the pain for several months before she first saw him in December 1994. Dr. Magness did not note any further foot problems. Since the pain injections appeared to have improved the right foot pain , though not the left, the claimant's condition, at least in terms of walking and standing, should be viewed as having improved somewhat sinceshe saw Dr. Magness, who assessed a more restrictive residual functional capacity (see Exhibit 24 at 1) than found in this decision. X-rays did not reveal any significant abnormalities in thelumbar or lumbosacral spines or feet. The claimant has had no extensive treatment for back or leg pain other than described above. Though it was noted in January 1995 that her left foot seemed to be worse, there is no evidence of further treatment for the neuromas condition thereafter.

The records of Dr. Vora, the claimant's family physician, indicate no visits between May 1993 and November 1994 and only about eight visits from November 1994 to January 1996 (Exhibits 26 and 31). Dr. Vora reported in December 1995 that the prescribed medication, Relafen, provided relief from back pain but that the claimant stated she could not afford such medication. Therefore, she has generally taken only over-the-counter medication. There have been no hospitalizations for a musculoskeletal condition or trips to the emergency room for pain. Surgery has not been recommended. Treatment has been minimal.

In terms of daily activities the claimant testified that she does not do much housework and that her son and daughter do it for her. She said that she does some microwave cooking, dusting, and washing dishes. She stated that she shops about once or twice a week and that she visits others occasionally.

The claimant reported that she sits in a recliner most of the day. She stated that she watches television but that she is forgetful. The claimant told Dr. Wilcox that she does not see other people often but that she puts on a front of being friendly when she does interact with others (Exhibit 23 at 3). She also told Dr. Wilcox that she neededassistance with heavier housework and with transportation since she has never driven a car. The claimant stated that she was completely dependent on her husband.

The location, duration, frequency, and intensity of the claimant's alleged symptoms, as well as precipitating and aggravating factors, are adequately addressed by a residual functional capacity for the above-described reduced range of light work. The objective medical evidence does not indicate a musculoskeletal impairment that would limit the claimant to the inactive lifestyle she has described.

Claimant stated that she can not take prescribed medication because she can not afford it. The medical notes of Dr. Vora indicated, however, that she has at times prescribed medication for pain and depression (Exhibit 31). The claimant did not report any side effects to this medication.

The claimant's psychological condition appears to be the major factor in her inertia and loss of interest in daily activities. However, Dr. Wilcox, who performed a thorough psychological examination, did not indicate disability and he assigned a Global Assessment of Functioning (GAF) score of 60, which according to the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, p. 32, indicates no more than moderate limitations in occupational impairment. The above non-exertional limitations are based on the limitations

suggested by Dr. Willcox in his report, and follow from the existence of borderline intellectual functioning which would limit claimant to performing simple work, with no reading or writing skills required. There is no adequate basis for imposing any restriction on public contacts (Exhibits 23, 27). Claimant reported no problems dealing with others, However, I defer to Dr. Willcox's judgment that she should have limited dealings with supervisors and co-workers because of her depression.

The claimant has not performed any past relevant work. Therefore, the burden shifts to the Commissioner to show that there are jobs existing in significant numbers in the national economy whichshe can perform, consistent with her medically-determinable impairments, functional limitations, age, education, and work experience. The Commissioner is able to satisfy the required burden of proof in this case.

The claimant was born on August 28, 1944. She is 51 years old and considered to be "closely approaching advanced age" (20 CFR 404.1563). She has an eighth-grade or "limited" education (20 CFR 404.1564). The claimant does not have "transferable" work skills within the meaning of the Social Security Act (20 CFR 404.1568).

If the claimant retained the functional capacity to perform the full range of light work, section 404.1569 of Regulations No, 4 and vocational rule 202.10, Table No. 2, Appendix 1, Subpart P, Regulations No. 4, would direct a finding of "not disabled." However, the claimant can perform only a reduced range of light work.

Ms. Charlotta Ewers, an independentvocational expert, testified that a hypothetical individual with the claimant's vocational profile and residual functional capacity would be able to perform approximately 30,000 light jobs in the Dayton/Cincinnati, Ohio, region such as electronics worker, production assembler, marker, laundry folder, and inspector/hand packager, as well as 3,800 sedentary jobs. She further testified that even if this hypothetical individual were further restricted to performing work which required lifting of only five pounds, gave him or her the freedom to change sitting and standing positions at will, and did not require any significant walking, some 1,500 of the light jobs as well as the 3,800 sedentary jobs would remain, a number which I find to be significant. These are limitations that are more consistent with claimant's own description of her specific capabilities, but are limitations which I find excessive in view of the nature of the objective evidence of musculoskeletal impairment in this case.

In defining jobs which a hypothetical individual with the claimant's vocational profile and residual functional capacity could do, Ms. Ewers did not limit her consideration to the immediate area where the claimant lives, i.e., near Marietta, Ohio. However, 20 CFR 404.1566 provides, in pertinent part, that work exists in the national economy when it exists in significant numbers either in the region where the individual lives or in several other regions of the country. It does not matter whether the work exists in the immediate area where the individual lives or whether a specific job vacancy exists for her. In this case, the vocational expert testified to a number of jobs which I find significant in terms of the Dayton/Cincinnati economy. The vocational expert's testimony indicated that the Dayton/Cincinnati region has a

work force of about one million (about one percent of the national work force), which is representative of the national economy, whereas the Marietta region lacks a strong industrial or manufacturing base and isnot representative of the national economy. Furthermore, the vocational expert's testimony indicated that the jobs cited exist in significant numbers in other regions of the nation, thereby satisfying the "significant numbers" test set forth in 20 CFR 404.1566. In my opinion, the jobs identified by the vocational expert are representative of a significant numberof jobs, both regionally and nationally, which the claimant remains capable of performing despite her alleged impairments.

Accordingly, having carefully considered the objective medical evidence and clinical findings of record, the subjective complaints and allegations of the claimant, and the expert vocatlonal testimony, I find that the claimant's capacity for light work has not been significantly compromised by the functional limitations imposed by her impairments. Applying the above-cited rule as a framework for decisionmaking, the claimant cannot be found "disabled," within the meaning of the Social Security Act, at any time through the date of this Decision.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant was born on August 28, 1944, and she attained age 50 on August 27, 1944 (20 CFR 404.2(c) (4)).

2. The claimant is the widow of the deceased wageearner who died fully insured for Social Security purposes on August 1, 1992. The claimant married the deceased wage earner on September 19, 1965, and she remained married to him until his death. The claimant has not remarried.

3. The period during which the claimant must establish that she was under a disability extended through July 31, 1999.

4. The claimant alleges disability since March 1, 1994. There is no evidence that she has performed any substantial gainful activity in the relevant past.

5. The evidence establishes that the claimant has severe borderline intellectual functioning, major depression, and recurrent back and leg pain due to probable strain or mild arthritis but that she does not have an impairment or combination of impairments that meets or equals the level of severity required by Appendix 1, Subpart P, Regulations No. 4.

6. The claimant's allegations and subjective complaints are not fully supported by the medical record of evidence and cannot be totally accepted as credible.

7. The claimant lacks the residual functional capacity to: (1) do greater than light exertional

work activity; (2) perform jobs requiring reading and writing skills; (3) have more than limited contact with supervisors andco-workers; (4) concentrate on a single task last longer than 15 minutes at a time (but the claimant is free to turn her attention to other matters thereafter); (5) perform other than simple, repetitive tasks or tasks requiring her to follow complex or detailed instructions; or (6) work in a other than a low stress environment.

8. The claimant is 51 years old and considered to be "closely approaching advanced age."

9. The claimant has an eighth-grade or "limited" education.

10. The claimant does not have past relevant work experience.

11. The claimant does not have "transferable" work skills within the meaning of the Social Security Act.

12. If the claimant retained the functional capacity to perform the full range of light work, section 404.1569 of Regulations No. 4 and vocational rule 202.10, Table No. 2, Appendix 1, Subpart P, Regulations No. 4, would direct a finding of "not disabled." However, the claimant can perform only a reduced range of light work.

13. Since the claimant has only nonexertional limitations, using the above-cited rule as a framework for decisionmaking, there is a significant number of jobs in the national economy which she could perform. Examples of such jobs are electronics worker, production assembler, marker, laundry folder, and inspector/hand packager. There are at least 33,800 such jobs in the regional economy of Dayton/Cincinnati, Ohio, and such jobs exist in proportionate numbers in the national economy as well.

14. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that the claimant is not entitled to widow's insurance benefits (disability) under sections 202(e) and 223, respectively, of the Social Security Act.

/s/ _____
James I.K. Knapp
Administrative Law Judge

Date May 3, 1996

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

Name: Linda L. Hollins SSN: 293-34-1048

Assessment is for: Current Evaluation

Administrative Law Judge's Signature Date

/s/ _____ May 3, 1996
James Knapp

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.04, 12.05, 12.08

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER
(Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT-ABSENT

[ ]	[x]	12.02	Organic Mental Disorders
[ ]	[x]	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	12.04	Affective Disorders

[x]	[ ]	12.05	Mental Retardation and Autism
[ ]	[x]	12.06	Anxiety Related Disorders
[ ]	[x]	12.07	Somatoform Disorders
[x]	[ ]	12.08	Personality Disorders
[ ]	[x]	12.09	Substance Addiction Disorders

C. **12.04 Affective Disorders** - Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:
   - a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
   - b. [ ] Appetite disturbance with change in weight, or
   - c. [ ] Sleep disturbance, or
   - d. [ ] Psychomotor agitation or retardation, or
   - e. [ ] Decreased energy, or
   - f. [ ] Feelings of guilt or worthlessness, or
   - g. [ ] Difficulty concentrating or thinking, or
   - h. [ ] Thoughts of suicide, or

i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
   - a. [ ] Hyperactivity, or
   - b. [ ] Pressures of speech, or
   - c. [ ] Flight of ideas, or
   - d. [ ] Inflated self-esteem, or
   - e. [ ] Decreased need for sleep, or
   - f. [ ] Easy distractibility, or
   - g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
   - h. [ ] Hallucinations, delusions or paranoid thinking

3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: Adjustment Disorder

D. **12.05 Mental Retardation and Autism** - Significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22), or pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded*

2. [ ] [x] [ ] A valid verbal, performance, or full scale I.Q. of 59 or less*

3. [ ] [x] [ ] A valid verbal, performance, or full scale I.Q. of 60 to 70 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function*

4.	[ ]	[x]	[ ]	A valid verbal, performance or full scale I.Q. of 60 to 70 inclusive or in the case of autism, gross deficits of social and communicative skills*
5.	[x]	[ ]	[ ]	Other: Borderline Intellectual Functioning with Illiteracy

* NOTE: Items 1, 2, 3, and 4 correspond to Listings 12.05A, 12.05B, 12.05C, and 12.05D, respectively.

G. **12.08 Personality Disorders** - Inflexible and maladaptive personality traits which cause either significant impairment in social or occupational functioning or subjective distress, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	Seclusiveness or autistic thinking
2.	[ ]	[x]	[ ]	Pathologically inappropriate suspiciousness or hostility
3.	[ ]	[x]	[ ]	Oddities of thought, perception, speech and behavior
4.	[ ]	[x]	[ ]	Persistent disturbances of mood or affect
5.	[x]	[ ]	[ ]	Pathological dependence, passivity, or aggressivity
6.	[ ]	[x]	[ ]	Intense and unstable interpersonal relationships and

impulsive and damaging behavior

7. [ ] [x] [ ] Other:

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05) EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER(S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing(s) under which the items below are being rated: 12.04, 12.05, 12.08

OHA Psychiatric Review Technique Form - 5/3/96

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

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1. Restrictions of Activities of Daily Living:

None[ ] Slight[x] Moderate[ ] Marked*[ ] Extreme[ ]
Insuff Evid[ ]

---

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[ ] Moderate[x] Marked*[ ] Extreme[ ]
Insuff Evid[ ]

---

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[x] Frequent*[ ] Constant[ ]
Insuff Evid[ ]

---

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never[x] Once/Twice[ ] Repeated*(3+) [ ] Continual[ ] Insuff Evid[ ]

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*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

Supreme Court, U.S.
FILED
JUN 11 2003
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(2)

No. 02-1489

In the Supreme Court of the United States

LINDA HOLLINS, PETITIONER

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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23pp

QUESTION PRESENTED

Whether, after a district court remands a Social Security disability case to the Commissioner of Social Security pursuant to sentence four of 42 U.S.C. 405(g), an Administrative Law Judge (ALJ) is limited to deciding only the specific issues identified by the district court's decision, or whether the ALJ may reconsider other issues where doing so is not inconsistent with the district court's judgment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Bowen v. *Yuckert*, 482 U.S. 137 (1987)	3
Chrupcala v. *Heckler*, 829 F.2d 1269 (3d Cir. 1987)	9, 13, 14-15
Clay v. *United States*, 123 S. Ct. 1072 (2003)	18
Cleveland v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999)	3
FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952)	11
Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981)	16
Fogel v. *Chestnutt*, 668 F.3d 100 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982)	16
Heckler v. *Campbell*, 461 U.S. 458 (1983)	3
Hooper v. *Heckler*, 752 F.2d 83 (4th Cir. 1985)	16
Horrell v. *Chater*, 54 F.3d 787 (10th Cir. 1995)	16
INS v. *Ventura*, 123 S. Ct. 353 (2002)	11
Key v. *Sullivan*, 925 F.2d 1056 (7th Cir. 1991)	16
Mefford v. *Gardner*, 383 F.2d 748 (6th Cir. 1967)	9
Port of Portland v. *United States*, 408 U.S. 811 (1972)	11
Quern v. *Jordan*, 440 U.S. 332 (1979)	17
Rivet v. *Louisiana*, 522 U.S. 470 (1998)	16
Ruiz v. *Apfel*, 24 F. Supp. 2d 1045 (C.D. Cal. 1998)	15
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947)	11, 15, 16

Cases—Continued: Page

Semtek Int'l, Inc. v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001) 17
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 18
Sullivan v. *Hudson*, 490 U.S. 877 (1989) 8, 9, 10
United States v. *Campbell*, 168 F.3d 263 (6th Cir.), cert. denied, 528 U.S. 882 (1992) 10, 11
United States v. *Moore*, 131 F.3d 595 (6th Cir. 1997) 11
United States v. *Washington*, 172 F.3d 1116 (9th Cir. 1999) 10
United States v. *Young*, 66 F.3d 830 (7th Cir. 1995) 10

Statutes and regulations:

Equal Access to Justice Act, 28 U.S.C. 2412 *et seq.* 10
Social Security Act, Tit. II, 42 U.S.C. 401 *et seq.* 2
42 U.S.C. 402(e)(1)(B) 2
42 U.S.C. 402(e)(4) 2
42 U.S.C. 405(g) 10
42 U.S.C. 423(d)(1)(A) 2
42 U.S.C. 423(d)(2)(A) 2
20 C.F.R. Pt. 404:
Subpt. J:
Section 404.977 ..... 14, 15
Section 404.983 ..... 10, 14, 15
Subpt. P:
Section 404.1520(a) 3
Section 404.1520(b) 3
Section 404.1520(c) 3
Section 404.1520(d) 3
Section 404.1520(e) 4
Section 404.1520(f) 4
App. 1 3
Listing 12.05C 4, 5, 12, 13

Miscellaneous: Page

54 Fed. Reg. 37,789 (1989) 10, 14

In the Supreme Court of the United States

No. 02-1489

LINDA HOLLINS, PETITIONER

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is unreported. The opinion of the district court (Pet. App. 16a-30a) is reported at 160 F. Supp. 2d 834. A previous opinion of the district court remanding the case to the Commissioner (Pet. App. 75a-78a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2002. A petition for rehearing was denied on January 10, 2003. The petition for a writ of certiorari was filed on April 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, provides disability insurance benefits to covered workers and, in certain circumstances, to the disabled widows and widowers of covered workers. The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). An individual may be found to be under a disability, moreover, "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A). To qualify for widow's insurance benefits, a claimant must establish that she became disabled sometime between her 50th birthday and the seventh year following the death of her spouse. 42 U.S.C. 402(e)(1)(B), 402(e)(4).

Petitioner filed a claim for benefits as the disabled widow of a covered worker. Her claim was denied initially and on reconsideration. Pet. App. 96a. Petitioner then sought a hearing before an Administrative Law Judge (ALJ), who conducted the hearing in April, 1996. *Ibid.* The ALJ determined that petitioner had several physical impairments and limited intellectual functioning. *Id.* at 108a. Nonetheless, the ALJ determined that petitioner was not disabled. Petitioner's residual functional capacity, the ALJ found, permitted her to perform a significant number of light jobs. *Id.* at 106a-107a, 110a; see *id.* at 4a, 19a. The ALJ concluded

that petitioner's "capacity for light work has not been significantly compromised by the functional limitations imposed by her impairments." *Id.* at 107a.

Petitioner sought review in district court, arguing that the ALJ's determination was not supported by substantial evidence. Specifically, petitioner argued that she should have been found disabled based on the Social Security Administration's "Listing of Impairments." See 20 C.F.R. Pt. 404, Subpt. P, App. 1. The Listings identify impairments that are presumed to be so severe as to preclude all gainful activity. If a claimant has a listed impairment (and is not currently engaged in substantial gainful activity), the claimant generally will be found disabled without further inquiry. 20 C.F.R. 404.1520(d).[1] If the claimant's impairments do not meet the Listing requirements, however, the ALJ will evaluate her "residual functional capacity" and decide whether she can perform her former work or any other work. Such a claimant will be found disabled only if (a) she is functionally incapable, because

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[1] The Listings are employed at step three of the five-step sequential evaluation process the Commissioner uses to decide disability claims. See *Heckler* v. *Campbell*, 461 U.S. 458, 460-461 (1983); *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999); *Bowen* v. *Yuckert*, 482 U.S. 137, 147-148 (1987). Under that process, a claimant can be found disabled or not disabled at various points. If that occurs, the evaluation does not proceed further. 20 C.F.R. 404.1520(a). At step one, the Commissioner asks whether the claimant is currently engaging in substantial gainful activity; if the claimant is, she is not disabled. 20 C.F.R. 404.1520(b). At step two, the Commissioner asks whether the claimant has a severe impairment, or combination of impairments, "which significantly limits" her "ability to do basic work activities," such as lifting, standing, and walking, 20 C.F.R. 404.1520(c); if the impairment or impairments are not so severe as to significantly limit such activities, the claimant is not disabled. *Ibid.*

of her impairment or combination of impairments, of performing the kind of work she has done in the past, and (b) she cannot perform any other work in the national economy, considering her residual functional capacity, age, education, and work experience. 20 C.F.R. 404.1520(e), 404.1520(f).[2]

In this case, petitioner argued that her combined physical and mental impairments were equivalent to the Listing for mental retardation, 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 12.05C. See Pet. App. 4a, 83a. In addition, petitioner argued that the ALJ should have found that she was illiterate. *Ibid.* Adopting the recommendations of a magistrate judge, *id.* at 79a-87a, the district court agreed that the ALJ had not addressed those issues with sufficient clarity, but declined to rule that petitioner's impairments were equivalent to Listing 12.05C (mental retardation). Pet. App. 75a-76a, 86a; see *id.* at 4a. Instead, the court remanded the case to the agency "for further proceedings." *Id.* at 75a.

2. On remand, the ALJ reconsidered the specific issues identified by the district court, taking new evidence and conducting a new hearing. The ALJ explained that, following a psychological examination, Dr. West had reported that petitioner's IQ test scores ranged from 68 to 79. Pet. App. 45a. However, Dr. West concluded that those scores were "invalid due to low effort, interest, and motivation on [petitioner's] part." *Ibid.* In addition, Dr. West found "no indication

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[2] The inquiry into whether the claimant can do her former work is step four of the five-step sequential evaluation process. 20 C.F.R. 404.1520(e). The inquiry into whether the impairment prevents the claimant "from doing any other work," considering her residual functional capacity, age, education, and work experience, is step five. 20 C.F.R. 404.1520(f).

of a formal thought disorder, hallucinations, or delusional thinking." *Id.* at 46a. Although petitioner suffered from depression, Dr. West stated that petitioner "would be able to relate appropriately with fellow workers and supervisors," could follow simple instructions, and could maintain adequate concentration to accomplish assigned tasks. *Ibid.* Dr. West concluded: "The findings indicate that [petitioner] would have minimal impairment in being able to deal with day to day work activity, given her current cognitive and psychological functioning." *Ibid.*

To determine whether petitioner's impairments "equalled" the Listing for mental retardation, Listing 12.05C, the ALJ also obtained the "medical expert opinion" of Dr. Serednesky. Pet. App. 47a. Dr. Serednesky reported that petitioner did not meet the Listing for mental retardation because "the subtest scatter between * * * IQ testing contained in the record * * * demonstrated malingering, the IQ scores conflicted with memory testing, and [petitioner] put forth no effort during the testing." *Ibid.* Dr. Serednesky also stated that "the record contained no data that would suggest medical equivalence to any Listing." *Ibid.* The ALJ therefore determined that petitioner did not meet Listing 12.05C. Pet. App. 56a-57a, 62a.

The ALJ further determined, however, that he had erred in his previous evaluation of petitioner's physical impairments. In particular, the ALJ concluded that petitioner did not have any severe physical impairments and that her non-exertional (*e.g.*, mental) impairments did not preclude substantial gainful activity. The ALJ explained that his earlier (pre-remand) finding that plaintiff could perform only a reduced range of light work was incorrect because it was based not on medical evidence but rather "on plaintiff's age and

general deconditioning," which are irrelevant to the determination of residual functional capacity. Pet. App. 48a, 49a; see *id.* at 102a. Examining the medical evidence in the record, the ALJ found that "the evidence documented no severe nerve or muscle damage which might cause significant weakness or limited movement." *Id.* at 52a-53a. The ALJ continued:

> The evidence of record documents no bony changes, muscle atrophy or weakness, or reflex or sensory changes. Accordingly, as there is no objective evidence of a significant physical impairment, and [petitioner] has refused to cooperate in an assessment of her physical condition, a "severe" physical impairment cannot be found.

Id. at 53a.[3] Relying on the testimony of a vocational expert, the ALJ concluded that there was a range of jobs that someone with petitioner's residual functional capacity could perform. *Id.* at 59a-61a. The ALJ therefore found that petitioner was not disabled. *Id.* at 64a.

3. Petitioner again sought review in district court. This time, petitioner argued that the ALJ was bound by the earlier determination that she did have severe physical impairments that greatly restricted the range of work she can do. Pet. App. 25a-26a; see *id.* at 5a. The district court disagreed, concluding that the earlier decision of the ALJ was no longer binding, because petitioner had sought judicial review and the court had entered an order reversing and remanding. *Id.* at 27a; see *id.* at 5a.

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[3] The ALJ had determined that a formal orthopedic evaluation was necessary. Pet. App. 49a. Petitioner, however, declined to participate in the evaluation based on the advice of counsel. *Id.* at 49a, 52a.

Petitioner also argued that the district court's initial decision established the law of the case regarding her physical capacity; in the alternative, she relied on issue preclusion. Pet. App. 27a. The district court rejected those arguments. Petitioner, the district court observed, could not rely on *res judicata* principles because critical requirements for issue preclusion—a final judgment on the merits and resolution of the specific issues as a "necessary" or "essential" component of that judgment—were absent. See *id.* at 27a-28a.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 3a-15a. Before the court of appeals, petitioner did not argue that the ALJ was bound by his own earlier determination that petitioner had severe physical impairments. *Id.* at 5a. Instead, relying on the district court's earlier decision remanding the case, petitioner argued that reconsideration was barred by the law-of-the-case doctrine or *res judicata* (claim and issue preclusion). *Ibid.* The court of appeals rejected those arguments, explaining that a district court ruling is preclusive with respect to claims and issues only if there is a final judgment on the merits, and that issue preclusion applies only as to an issue "actually litigated and decided in the prior action" and only if "resolution of the issue was necessary and essential to a judgment on the merits." *Id.* at 5a-6a (citation omitted).

In this case, the court of appeals found that the district court's initial decision "did not constitute a decision on the merits regarding [petitioner's] residual functional capacity." Pet. App. 6a. To the contrary, the court explained, the decision addressed only "the two narrow errors committed by the ALJ in the initial hearing." *Ibid.* "The merit of the ALJ's determination regarding [petitioner's] physical capacity," the court continued, was merely "assumed" but not decided.

"The fact that the ALJ made certain factual findings" may have been important, the court explained, "but the truth of those findings" was not at issue. *Ibid.*

The court of appeals also rejected petitioner's argument that the ALJ had exceeded the scope of the district court's initial remand order. The court agreed that an agency may not deviate from the court's remand order in later administrative proceedings. Pet. App. 7a (citing *Sullivan* v. *Hudson*, 490 U.S. 877, 886 (1989)). But the court of appeals held that that limit "do[es] not preclude the ALJ from acting in ways that go beyond, but are not inconsistent with, the district court's opinion." *Ibid.* In this case, the court concluded that "[r]econsideration of [petitioner's] physical impairments was not inconsistent with any express or implied order of the district court." *Id.* at 7a-8a.

The court of appeals also observed that the ALJ did not need a mandate from a federal court to consider the extent of petitioner's physical impairments, because the power to do so derives from the legislative grant of authority contained in the Social Security Act. The court noted that the Social Security Administration has promulgated a regulation informing claimants that, upon remand by a federal court, "any issues relating to your claim may be considered by the administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in your case." Pet. App. 8a (quoting 20 C.F.R. 404.983). The court held that "[t]he ALJ therefore did not act outside his authority" in examining petitioner's "physical capacity." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

other court of appeals. Further review therefore is not warranted.

1. Petitioner argues (Pet. 10) that the court of appeals' unpublished decision is inconsistent with this Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877, 886 (1984), and conflicts with *Chrupcala* v. *Heckler*, 829 F.2d 1269 (3d Cir. 1987). According to petitioner, "[w]here a remand order expressly states the terms of the remand, then neither the Appeals Council nor the ALJ may revisit previous determinations on other issues." Pet. 10. Petitioner argues that "the original remand order" in this case "was for such a limited, specific purpose," and therefore foreclosed reconsideration of issues "beyond the scope of [that] order." *Ibid.* Those arguments lack merit.

a. In *Hudson*, this Court observed that "the district court's remand order will often include detailed instructions concerning the scope of remand, the evidence to be adduced, and the legal or factual issues to be addressed." 490 U.S. at 885. In those circumstances, the Court noted, "[d]eviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Id.* at 886; see also *Mefford* v. *Gardner*, 383 F.2d 748, 758 (6th Cir. 1967) (noting "the general rule that, on the remand of a case after appeal, it is the duty of the lower court, or the agency from which appeal is taken, to comply with the mandate of the court and to obey the directions therein without variation and without departing from such directions"). As the court of appeals explained in this case, however, *Hudson* did not address the extent to which an ALJ might consider issues "that go beyond, but are not inconsistent with, the district court's opinion." Pet. App. 7a.

Indeed, *Hudson* did not involve any issue concerning the limits on an ALJ's authority after a remand; rather, the issue in *Hudson* was whether the Equal Access to Justice Act, 28 U.S.C. 2412 *et seq.*, entitles a Social Security claimant to attorney's fees for representation in administrative proceedings before the agency following a district court remand. 490 U.S. at 879. *Hudson* thus had no reason to address, and did not address, the effect of the Commissioner's regulations, including 20 C.F.R. 404.983, which provides that, after "a Federal court remands a case to the Commissioner for further consideration," any "issues relating to your claim may be considered by the administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in your case."[4]

In any event, remands (whether to a lower court or an administrative agency) generally can be categorized either as "limited" or "general" in scope. See, *e.g.*, *United States* v. *Washington*, 172 F.3d 1116, 1118 (9th Cir. 1999); *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 528 U.S. 882 (1999); *United States* v. *Young*, 66 F.3d 830, 835 (7th Cir. 1995). "Limited remands explicitly outline the issues to be addressed by the [lower] court and create a narrow framework within which the [lower] court must operate. * * * General remands, in contrast, give [lower] courts authority to address all matters as long

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[4] Petitioner mistakenly argues that 20 C.F.R. 404.983 "does not apply to sentence four remands under 42 U.S.C. § 405(g)," the type of remand at issue here. Pet. 12. Petitioner identifies no support for such a conclusion, and nothing in the language of the regulation limits Section 404.983 to sentence six remands. See 54 Fed. Reg. 37,789 (1989). If the agency had wanted to limit the regulation to sentence six remands, it certainly could have done so.

as remaining consistent with the remand." *Campbell*, 168 F.3d at 265 (citation omitted). It is generally understood that, "[i]n the absence of an explicit limitation, [a] remand order is presumptively a general one." *Id.* at 268 (quoting *United States* v. *Moore*, 131 F.3d 595, 598 (6th Cir. 1997)).

That presumption has special force in the context of judicial review of agency action, for "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). The reviewing court's role, in other words, "is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles," *Port of Portland* v. *United States*, 408 U.S. 811, 842 (1972), not to limit the agency's authority to re-examine the case (perhaps through the receipt of new evidence) and identify other grounds for decision. See *INS* v. *Ventura*, 123 S. Ct. 353, 356 (2002).

Indeed, in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), this Court rejected the contrary view, upholding an agency decision that, following the Court's remand, reaffirmed the agency's initial decision on new grounds. See *id.* at 200-201. "After the remand was made," the Court explained, "the [agency] was bound to deal with the problem afresh, performing the function delegated to it by Congress. * * * Only in that way could the legislative policies embodied in the Act be effectuated." *Id.* at 201. General remands, moreover, are particularly appropriate in disability cases such as this one, because disability determinations turn on numerous variables, some of which change with the passage of time. To construe remand orders with undue rigidity would in many cases prejudice claimants—particularly those

with progressive diseases—by precluding consideration of additional evidence supporting their disability claims.

In this case, petitioner's argument rests on the mistaken premise that the district court's initial remand order was "limited" to the specific issues discussed in the district court's opinion. While the district court remanded the case to permit the agency to give further consideration to the equivalency issue—*i.e.*, petitioner's contention that her impairments should be considered the equivalent of the impairment described in Listing 12.05(C)—and petitioner's claim that she was illiterate, see Pet. App. 84a-86a, neither the magistrate judge's Report and Recommendation, nor the district court's order adopting that Report and Recommendation, contained detailed or specific instructions regarding the scope of the remand, the evidence to be adduced on remand, or limitations on the legal or factual issues that the ALJ could address. Instead, both simply concluded that the case should be remanded "for further proceedings pursuant to 42 U.S.C. § 405(g), sentence four." See Pet. App. 75a-76a, 86a.

Thus, as the court of appeals explained, "[r]econsideration of [petitioner]'s physical impairments was not inconsistent with any express or implied order of the district court." Pet. App. 7a-8a. In any event, whether or not the particular district court judgment at issue here contained language expressly or impliedly foreclosing the ALJ's consideration of a given matter is a highly fact-bound issue that does not warrant this Court's review. In fact, further review is especially unwarranted because resolution of that issue turns in the first instance on the district court's interpretation of its own prior judgment in the case, based on its familiarity with the prior and current proceedings, and the court of appeals sustained the district court's ruling.

The issues addressed by the ALJ on remand, moreover, *were* within the scope of the remand order even as petitioner would narrowly construe it. That order directed reconsideration of whether petitioner met the Listing for mental retardation, Listing 12.05C. Listing 12.05(C) provides that an individual will be presumed disabled if: (1) her IQ is between 60 and 70; (2) she has another physical or mental impairment that imposes "an additional and significant work-related limitation of function"; and (3) her mental deficiency manifested before age 22. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 12.05C. Thus, in applying that Listing, the ALJ was permitted to examine not only petitioner's IQ but also her other physical and mental impairments, and to determine whether they impose "significant work-related limitation[s]." Nothing in the district court's remand order required that the ALJ, after having done so, *ignore* the resulting findings insofar as they relate to other disability issues (*e.g.*, ability to perform jobs in the national economy).

b. Contrary to petitioner's claims, the decision below does not conflict with the Third Circuit's decision in *Chrupcala* v. *Heckler*, *supra*, decided more than 15 years ago. In *Chrupcala*, the ALJ determined that the claimant had been disabled for a year and a half and awarded benefits for that period. Because the ALJ determined that the disability had ceased, however, he also denied the claim for continued benefits. The claimant sought judicial review of the determination that his disability had ended, and the district court remanded the case for a further administrative hearing. On remand, the ALJ determined that the claimant was not entitled to *any* period of disability. 829 F.2d at 1270-1271. Reversing, the court of appeals held that the ALJ lacked authority to examine issues on remand

other than those that were actually raised by the claimant in his civil action in district court. The court concluded that, absent adequate notice, the claimant had no reason to question the finality of the portion of the agency decision finding him disabled for a certain period of time, which was favorable to the claimant and therefore not subject to judicial review on the prior occassion. See *id.* at 1270, 1273-1274.

The court rested its decision in significant part, however, on the fact that the agency's regulations regarding remands at that time "provide[d] no clear guidance as to the scope of issues that may be reviewed when the district court remands a case to the Secretary." 829 F.2d at 1272 (discussing 20 C.F.R. 404.983 and 404.977 (1986)). After *Chrupcala* was decided, the agency amended its regulations to provide explicit guidance as to the scope of issues that may be reviewed by the agency following a remand. Thus, 20 C.F.R. 404.983 now states that, when a federal court remands a case to the Commissioner for further consideration, "[a]ny issues relating to [the claimant's] claim may be considered by the administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in [the] case." See 54 Fed. Reg. 37,791 (1989). In light of that amendment, it is doubtful that the Third Circuit would consider *Chrupcala* binding precedent today.

Chrupcala, moreover, involved action on remand quite different from the actions at issue here. In *Chrupcala*, the ALJ did not merely reach the same result on remand—a denial of benefits—based on new evidence and additional reasoning. Instead, the ALJ in *Chrupcala* reached a new result that *took away* an award of benefits that the agency had previously granted and that had not been at issue on appeal. 829

F.2d at 1271. Whatever *Chrupcala*'s current vitality, there is no reason to believe that the Third Circuit would extend the decision beyond that distinct context so as to preclude an ALJ from invoking alternative grounds to *reaffirm* the results of the ALJ's initial decision. See *Chenery*, 332 U.S. at 200-201; pp. 11-12, *supra*.[5]

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[5] Petitioner also contends (Pet. 10-11) that the decision below conflicts with *Ruiz* v. *Apfel*, 24 F. Supp. 2d 1045 (C.D. Cal. 1998). Because *Ruiz* is a district court decision, it does not implicate a circuit conflict. *Ruiz* is, in any event, distinguishable. In that case, the district court remanded the case to permit the ALJ to make complete credibility findings. *Id.* at 1050. On appeal from the remand decision, the district court relied on *Chrupcala* to hold that the ALJ had erred in going beyond that remand and re-deciding an issue that had previously been decided in the claimant's favor (and that, as a result, had not previously been addressed on judicial review). *Ibid.* The court recognized, however, that "[r]egulations promulgated after *Chrupcala* appear to conflict with its holding to some extent, in that they authorize the ALJ, in a case remanded by a federal court, to examine '[a]ny issues relating to your claim . . . whether or not they were raised in the administrative proceedings leading to the final decision in your case.'" *Id.* at 1050-1051 n.7 (quoting 20 C.F.R. 404.983). The district court therefore also relied on the fact that the order of the Social Security Administration Appeals Council in that case—which remanded the case to the ALJ—could not "reasonably be construed to authorize a review" of the additional issues given the "very specific and limited * * * scope" of the district court's remand order. *Ibid.* The district court therefore held that the ALJ's actions violated the Social Security Administration's rule that an ALJ must "follow the Appeals Council's remand order 'and may not take any additional action that is not inconsistent with the Appeals Council's remand order.'" *Ibid.* (quoting 20 C.F.R. 404.983, 404.977). The court also distinguished remands that, like the one at issue here, "contemplate[] the taking of new evidence and a *de novo* adjudication on the merits." *Ibid.*

2. Petitioner further contends that, to the extent that the decision below "allowed relitigation of an issue that was or could have been litigated" in the prior proceeding, it conflicts with this Court's decisions in *Rivet* v. *Louisiana*, 522 U.S. 470 (1998), and *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981). Pet. 11. Those cases hold that "'[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Rivet*, 522 U.S. at 476 (quoting *Moitie*, 452 U.S. at 398). Alternatively, petitioner argues that the decision below conflicts with other circuit court decisions holding that, under the "law of the case" doctrine, "[w]hen an appellate court has either expressly or by necessary implication decided an issue, that decision is binding in all later proceedings in the same case." Pet. 16 (citing *Key* v. *Sullivan*, 925 F.2d 1056 (7th Cir. 1991); *Horrell* v. *Chater*, 54 F.3d 787 (10th Cir. 1995) (Table); *Fogel* v. *Chestnutt*, 668 F.2d 100, 108 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982); and *Hooper* v. *Heckler*, 752 F.2d 83, 88 (4th Cir. 1985)).

As an initial matter, petitioner does not claim that the court of appeals' unpublished decision announces a new and incorrect standard for deciding claim preclusion, issue preclusion, and law-of-the-case issues. Instead, petitioner appears to argue that the court of appeals misapplied those doctrines to the facts of this case. The fact-bound claim that a court of appeals misapplied settled law (in an unpublished opinion) does not warrant this Court's review.

Petitioner's arguments are, in any event, unpersuasive. As the court of appeals explained, petitioner cannot prevail under a law-of-the-case or preclusion theory because the district court did not issue "a final

decision on the merits regarding her physical impairments and residual functional capacity." Pet. App. 5a-6a. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001) ("a judgment 'on the merits' triggers the doctrine of res judicata or claim preclusion"); *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979) (noting that the "doctrine of law of the case comes into play only with respect to issues previously determined"). As the court of appeals explained:

> [The district court's first opinion] did not constitute a decision on the merits regarding [petitioner's] residual functional capacity. The district court's opinion addressed only the two narrow errors committed by the ALJ in the initial hearing. The merit of the ALJ's determination regarding [petitioner's] physical capacity was assumed for the purposes of evaluating [petitioner's] claims regarding the ALJ's treatment of her combined mental and physical capacity. In other words, the district court held that *given* the ALJ's findings regarding physical capacity, the ALJ should have considered the combined effect of her mental and physical impairments and compared that full picture to Listing 12.05C.

Pet. App. 6a.

Construing its own opinion, the district court judge likewise found no issue preclusion because (a) "neither party in the earlier action actually litigated the finding that [petitioner] was limited to a reduced range of light work," and (b) "a finding regarding [petitioner's] residual functional capacity was not essential to the judgment actually rendered * * * in the earlier action." Pet. App. 28a. Furthermore, in the context of judicial review of agency action—where a reviewing court's task ends once it uncovers error in the an-

nounced grounds of the particular agency decision before it, see pp. 11-12, *supra*—principles of claim and issue preclusion should not be applied in a manner that precludes the agency having primary jurisdiction from re-examining the case on remand. Cf. *Chenery*, 332 U.S. at 200-201; p. 11, *supra*.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2003

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[6] Petitioner also argues (Pet. 14) that the court of appeals' decision conflicts with *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), because it renders remand orders (even those that grant less than all the relief requested) "non-final." Petitioner appears to confuse the issue of finality for purposes of permitting appeal to a court of appeals with the concept of a final judgment on the merits for purposes of determining claim and issue preclusion. See *Clay* v. *United States*, 123 S. Ct. 1072, 1076 (2003) ("Finality is variously defined; like many legal terms, its precise meaning depends on context."). In this case, the district court's initial decision did not conclusively resolve the ultimate issue of petitioner's entitlement to benefits.

Supreme Court, U.S.
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No. 02-1489

In the Supreme Court of the United States

LINDA L. HOLLINS,

Petitioner,

v.

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities ii

Reasons for Granting the Petition 1

Conclusion 4

TABLE OF AUTHORITIES

Cases:

Forney v. Apfel, 524 U.S. 266 (1998) 1

Sullivan v. Finkelstein, 496 U.S. 617 (1990) 1

Statutes:

42 U.S.C. § 405 (g) 1

Regulations:

20 C.F.R. § 404.983 . . . . . 2, 3

REASONS FOR GRANTING THE PETITION

This Petition for a *writ of certiorari* presents an issue potentially affecting thousands of Social Security appeals: Whether, in a Social Security claim, a remand order appealable under the statute precludes an Administrative Law Judge (ALJ) from reconsidering, without notice, issues from which no party appealed and which were not discussed by the magistrate judge or district court.

Respondent asks whether an ALJ can decide "only the specific issues identified by the district court, or whether the ALJ may reconsider other issues. . ." (Brief in Opposition at I)(hereinafter "Brief"). This suggests that respondent agrees that the original remand was limited to deciding only the specific issues the district court identified and addressed. Respondent then discussed "general" versus "limited" remands in non-Social Security contexts (Brief at 10-12), arguing that petitioner misinterpreted the nature of the remand in *Hollins 1* as "limited" and not "general" (Brief at 12-14). However, Social Security matters are not governed by criminal statutes, SEC statutes or regulations, or Court decisions from any other type of cases respondent cited as a basis for denying *certiorari*. Rather, 42 U.S.C. § 405(g) determines the scope of judicial review in social security claims. That statute defines two types of remands in Social Security claims: Sentence four and sentence six. *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). Discussing limited, specific, or general remands in criminal cases, or in the context of other administrative agency matters, is immaterial.

Under 42 U.S.C. § 405(g) and the decisions of this Court, a sentence four remand is a final appealable order from which an aggrieved party must appeal. *Forney v. Apfel*, 524 U.S. 266 (1998). By not following established precedent of this

Court, the Sixth Circuit has created a new and incorrect legal standard in deciding Social Security claims. Here, no one appealed from the undisputed sentence four remand order. Both parties thus waived all issues not raised in the court before the remand, and waived the right to appeal from any issue except those decided. When no appeal was timely made, the parties waived the right to reconsider issues beyond the scope of the remand.

The fact that petitioner's original district court appeal raised only two narrow issues in itself limited the scope of the original remand order. The Court of Appeals observed that petitioner's earlier appeal involved only "two narrow errors committed by the ALJ in the initial hearing" (Pet. Apx. at 4a). Respondent's own "Question Presented" to this Court concedes petitioner's argument that this case involved a sentence four remand, with limited issues, and that the ALJ "reconsider[ed] other issues" (Brief at I). Quoting one sentence of a remand order to prove that the remand was "general" is at best disingenuous: The order in *Hollins I* unequivocally provided two limited bases for the remand, as the Court of Appeals recognized (Pet. Apx. at 4a).

The Sixth Circuit decision ignored established precedent about judicial review in Social Security claims. Following respondent's argument cloaks her with omnipotent power to review any order from any court and to ignore any order with which she disagrees. In trying to justify this outcome, the Court of Appeals relied upon a strained interpretation of 20 C.F.R. § 404.983, which gave credence to respondent's claimed right to raise new issues from which no appeal was filed. Respondent did not discuss in any meaningful fashion how she preserved the right to reconsider unappealed issues. Respondent may not exempt herself from the need to appeal to a higher court from an adverse ruling by continuing to

claim the protection of 20 C.F.R. § 404.983 in a sentence four remand. Respondent could have raised as an issue petitioner's physical impairments in *Hollins 1*, and she had the responsibility to appeal from the decision in *Hollins 1* if she thought that decision was incorrect. Respondent may not now claim the right to an unfettered reconsideration of all issues, at anytime, in any type of remand.

This petition for a *writ of certiorari* is not a "fact-bound issue that does not warrant this Court's review" (Brief at 13). This issue affects every appeal to federal court in every Social Security claim involving an order of remand: It asks this Court to define the parameters of the administrative review of a claim on remand under the applicable statute. When a district court issues a specific basis for the remand, and when the respondent waives her right to object to the terms of the remand, and files no appeal as to those terms, she may not later exercise some supreme power to revisit uncontested and unappealed issues.

CONCLUSION

For the foregoing reasons and for the reasons set forth in her Petition for *writ of certiorari,* petitioner respectfully prays this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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